RECORD AND BRIEFS

17-340

Supreme Court, U.S.
FILED
SEP - 6 2017
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

NEW PRIME INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

JASON C. SCHWARTZ
JOSHUA S. LIPSHUTZ
AMANDA C. MACHIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

THEODORE J. BOUTROUS JR.
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tboutrous@gibsondunn.com

Counsel for Petitioner

Library of Congress
Law Library

QUESTIONS PRESENTED

Section 1 of the Federal Arbitration Act ("FAA") provides that the FAA does not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Respondent is an independent contractor whose agreement with interstate trucking company New Prime, Inc. ("Prime") includes a mandatory arbitration provision requiring Respondent to arbitrate all workplace disputes with Prime on an individual basis. Respondent does not challenge the validity of the arbitration agreement he signed or the delegation clause contained therein, which mandates that all disputes regarding arbitrability be decided by an arbitrator. Nonetheless, Respondent filed a putative class action in court and opposed arbitration on the basis of the Section 1 exemption.

The questions presented are:

1. Whether a dispute over applicability of the FAA's Section 1 exemption is an arbitrability issue that must be resolved in arbitration pursuant to a valid delegation clause.

2. Whether the FAA's Section 1 exemption, which applies on its face only to "contracts of employment," is inapplicable to independent contractor agreements.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner New Prime Inc. has no parent corporation and no publicly held corporation owns ten percent (10%) or more of its stock. New Prime, Inc. is a privately owned company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF APPENDICES iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 6

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT COURTS, DISTRICT COURTS, AND STATE APPELLATE COURTS 7

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT 11

III. THE FIRST CIRCUIT'S DECISION HAS SWEEPING IMPLICATIONS FOR THE TRANSPORTATION INDUSTRY 16

CONCLUSION 18

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner New Prime Inc. has no parent corporation and no publicly held corporation owns ten percent (10%) or more of its stock. New Prime, Inc. is a privately owned company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF APPENDICES iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 6

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT COURTS, DISTRICT COURTS, AND STATE APPELLATE COURTS 7

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT 11

III. THE FIRST CIRCUIT'S DECISION HAS SWEEPING IMPLICATIONS FOR THE TRANSPORTATION INDUSTRY 16

CONCLUSION 18

TABLE OF APPENDICES

Page

APPENDIX A: Opinion of the United States Court of Appeals for the First Circuit (May 12, 2017) 1a

APPENDIX B: Order of the United States Court of Appeals for the First Circuit Denying Petitoin for Rehearing or Rehearing En Banc (June 27, 2017) 41a

APPENDIX C: Order of the United States District Court for the District of Massachusetts (October 26, 2015) 44a

APPENDIX D: Independent Contractor Operating Agreement (May 31, 2013) 63a

APPENDIX E: Independent Contractor Operating Agreement (March 12, 2014) 85a

TABLE OF AUTHORITIES

Page(s)

Cases

Alvarado v. Pac. Motor Trucking Co.,
2014 WL 3888184 (C.D. Cal. Aug. 7, 2014) 11

Am. Exp. Co. v. Italian Colors Rest.,
133 S. Ct. 2304 (2013) 2, 13, 17

Am. Trucking Ass'ns, Inc. v. United States,
344 U.S. 298 (1953) 17

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 2, 12, 17

AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643 (1986) 8, 12

Aviles v. Quik Pick Express, LLC,
2015 WL 5601824 (C.D. Cal. Sept. 23, 2015) 11

Carney v. JNJ Exp., Inc.,
10 F. Supp. 3d 848 (W.D. Tenn. 2014) 11

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) ..... *passim*

Cmty. for Creative Non-Violence v. Reid,
490 U.S. 730 (1989) 15

TABLE OF AUTHORITIES
(continued)

Page(s)

CompuCredit Corp. v. Greenwood,
565 U.S. 95 (2012) 13

Davis v. Larson Moving & Storage Co.,
2008 WL 4755835 (D. Minn. Oct. 27,
2008) 11

Diaz v. Mich. Logistics, Inc.,
167 F. Supp. 3d 375 (E.D.N.Y. 2016) 11

DirectTV, Inc. v. Imburgia,
136 S. Ct. 463 (2015) 2, 12

Doe v. Swift Transp. Co.,
2015 WL 274092 (D. Ariz. Jan. 22, 2015) 11

Epic Sys. Corp. v. Lewis,
Case No. 16-285 2

Ernst & Young LLP v. Morris,
Case No. 16-300 2

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 15

Green v. SuperShuttle, Int'l, Inc.,
653 F.3d 766 (8th Cir. 2011) 5, 8

Kindred Nursing Ctrs. Ltd. P'ship v. Clark,
137 S. Ct. 1421 (2017) 1, 12

TABLE OF AUTHORITIES
(continued)

Page(s)

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 1, 13

Morning Star Assocs., Inc. v. Unishippers Glob. Logistics, LLC, 2015 WL 2408477
(S.D. Ga. May 20, 2015) 11

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 2, 12, 13

Nat'l Labor Relations Bd. v. Murphy Oil USA, Inc.,
Case No. 16-307 2

Nationwide Mut. Ins. Co. v. Darden,
503 U.S. 318 (1992) 15, 16

Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co.,
288 F. Supp. 2d 1033 (D. Ariz. 2003) 11

Owner-Operator Indep. Drivers Ass'n v. United Van Lines, LLC,
2006 WL 5003366 (E.D. Mo. Nov. 15, 2006) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Performance Team Freight Sys., Inc. v. Aleman,
241 Cal. App. 4th 1233 (Cal. Ct. App. 2015) 10

Port Drivers Fed. 18, Inc. v. All Saints,
757 F. Supp. 2d 463 (D.N.J. 2011) 11

Rent-A-Center W., Inc. v. Jackson,
561 U.S. 63 (2010) 12

Roadway Package Sys., Inc. v. Kayser,
1999 WL 817724 (E.D. Pa. Oct. 13, 1999) 11

Shearson/Am. Express, Inc. v. McMahon,
482 U.S. 220 (1987) 12

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010) 17

In re Swift Transp. Co.,
830 F.3d 913 (9th Cir. 2016) 6, 9

In re Van Dusen,
654 F.3d 838 (9th Cir. 2011) 8

Villalpando v. Transguard Ins. Co. of Am.,
17 F. Supp. 3d 969 (N.D. Cal. 2014) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Volt Info. Scis., Inc. v. Bd. of Trustees, 489 U.S. 468 (1989) 12

Zambrano v. Strategic Delivery Sols., LLC, 2016 WL 5339552 (S.D.N.Y. Sept. 22, 2016) 11

Statutes and Rules

9 U.S.C. § 1 i

9 U.S.C. § 16 5

28 U.S.C. § 1254(1) 1

Federal Arbitration Act, 9 U.S.C. § 1 ..... *passim*

Federal Employers' Liability Act, 45 U.S.C. § 51 14

Jones Act, 46 U.S.C. § 30104 (formerly codified at 46 U.S.C. § 688) 14

Railway Labor Act of 1926, § 1, Pub. L. No. 69-257, 44 Stat. 577 14

Sup. Ct. R. 10(a) 6

Other Authorities

Black's Law Dictionary (10th ed. 2014) 16

PETITION FOR A WRIT OF CERTIORARI

Petitioner New Prime Inc. respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 857 F. 3d 7 (1st Cir. 2017). Pet. App. 1a. The court of appeals' order denying rehearing and rehearing en banc has not been published. Pet. App. 41a. The order of the district court is available at 141 F. Supp. 3d 125 (D. Mass. 2015). Pet. App. 44a.

JURISDICTION

The court of appeals filed its opinion on May 15, 2017, and denied a timely petition for rehearing and rehearing en banc on June 27, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. § 1, provides, in relevant part:

> [N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

STATEMENT

This Court has repeatedly underscored the "emphatic federal policy in favor of arbitral dispute resolution" that is embodied in the Federal Arbitration Act ("FAA"). *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S.

Ct. 1421, 1425 (2017); *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466 (2015); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011). As a matter of substantive federal law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

Moreover, this Court has repeatedly instructed lower courts to enforce arbitration agreements containing class waivers, as it is up to the parties to determine the manner of arbitration in which they wish to engage. *See Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) ("Consistent with th[e] text" of the FAA, "courts must rigorously enforce arbitration agreements according to their terms . . . , including terms that specify with whom the parties choose to arbitrate their disputes . . . ." (citation omitted)); *Concepcion*, 563 U.S. at 351 ("Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations.").

The decision below reflects the latest effort by a lower court to avoid these dictates and invalidate an arbitration agreement containing a class waiver—a tactic with which this Court is all too familiar. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, Case No. 16-285; *Ernst & Young LLP v. Morris*, Case No. 16-300; *Nat'l Labor Relations Bd. v. Murphy Oil USA, Inc.*, Case No. 16-307 (all scheduled for oral argument on October 2, 2017). This time, the feat was accomplished through a nonsensical interpretation of the FAA itself.

Section 1 of the FAA exempts a narrow class of transportation workers from the purview of the statute—those who have signed "contracts of employment." 9 U.S.C. § 1. This Court has instructed that the Section 1 exemption must be given a "precise

reading" and "a narrow construction," in order to ensure the FAA accomplishes its purpose of "overcom[ing] judicial hostility to arbitration agreements." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118-19 (2001) (citation omitted).

The First Circuit did the opposite. It read the Section 1 exemption expansively and effectively eliminated arbitration as a viable means of dispute resolution for the entire transportation industry. According to the court of appeals, the term "contracts of employment" in Section 1 should be read to include contracts of *non*-employment—that is, independent contractor agreements—notwithstanding the plain language of Section 1 to the contrary. Pet. App. 30a. By expanding the Section 1 exemption beyond its textual limit and refusing to compel arbitration, the First Circuit violated *Circuit City*, created conflicts with the Eighth and Ninth Circuits and the California Court of Appeal, and made the First Circuit an outlier jurisdiction in conflict with more than a dozen district court decisions around the country.

This Court's review is warranted to resolve the conflicts between the First Circuit's decision and decisions of the Eighth and Ninth Circuits and the California Court of Appeal interpreting the same Section 1 exemption, and to ensure the FAA remains effective and is enforced uniformly nationwide.

1. Petitioner New Prime, Inc. ("Prime") is an interstate trucking company that engages both company drivers and independent contractors to operate its vehicles. Respondent Dominic Oliveira is a former Prime driver who decided to become an independent contractor. In two separate Independent Contractor Operating Agreements, Oliveira (on behalf of his LLC, Hallmark Trucking Company) and Prime

agreed "that the intent of this Agreement is to establish an independent contractor relationship at all times." Pet. App. 64a; *id.* at 86a. They also agreed that "any disputes arising out of or relating to the relationship created by the agreement, and any disputes as to the rights and obligations of the parties, including the arbitrability of disputes between the parties, shall be fully resolved by arbitration in accordance with Missouri's Arbitration Act and/or the Federal Arbitration Act." Pet. App. 82a; *id.* at 103-104a; Pet. App. 115a-16a.

Respondent subsequently filed a putative class action against Prime, alleging claims for unpaid wages, misclassification as an independent contractor, and breach of contract. Prime moved to compel arbitration under the FAA. Although Respondent does not dispute the validity of the arbitration provisions or that they cover his claims against Prime, he argues that he should nonetheless be permitted to proceed in court on the basis that the contracts are exempt from enforcement under Section 1 of the FAA.

2. The district court denied Prime's motion to compel arbitration. It determined that the question whether the Section 1 exemption applies to the parties' contracts is a threshold issue for the court, and that the parties cannot delegate this issue to an arbitrator. The district court acknowledged that Section 1's reference to "contracts of employment" refers to employer-employee arrangements only, not independent-contractor agreements, explaining that "[t]his construction comports well" with the FAA's purpose and this Court's decision in *Circuit City*. Pet. App. 52a. But because the contract terms and existing factual record did not, in the district court's

view, make clear whether Prime and Respondent established an employer-employee or independent-contractor relationship, the district court ordered discovery on that question before determining whether the Section 1 exemption applies.

Prime appealed the district court's order denying the motion to compel arbitration under 9 U.S.C. § 16.

3. The First Circuit affirmed. The court held that applicability of the Section 1 exemption must be resolved by a court, even in the presence of an indisputably valid delegation clause. Pet. App. 35a. The court acknowledged that the Eighth Circuit had reached the opposite conclusion on the same question, holding that "'application of the FAA's transportation worker exemption is a threshold question of arbitrability.'" Pet. App. 11a (quoting *Green v. SuperShuttle, Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011)). Nevertheless, the court held that the district court must resolve the FAA Section 1 question before deciding whether to compel the parties to arbitration. Pet. App. 16a.

Two members of the panel went further, holding (contrary to the district court) that the term "contracts of employment" for purposes of Section 1 includes "transportation-worker agreements that establish or purport to establish independent-contractor relationships." Pet. App. 35a. Thus, the First Circuit's ruling removed *all* transportation workers from the ambit of the FAA, whether employees or independent contractors. The panel majority acknowledged that "the weight of district-court authority to consider the issue has concluded that the § 1 exemption does not extend to contracts that establish or purport to establish an independent-contractor relationship." Pet. App. 21a. And, in a

footnote, the panel majority conceded that the Ninth Circuit has also embraced that interpretation. Pet. App. 21a (quoting *In re Swift Transp. Co.*, 830 F.3d 913 (9th Cir. 2016) ("*Van Dusen III*")). But the panel majority disagreed with all of those courts, including the district court below, based on its broad interpretation of the term "contracts of employment."

Judge Barbadoro, sitting by designation, dissented from the second part of the panel's decision. Pet. App. 35a.

4. New Prime petitioned for rehearing and rehearing en banc, but the First Circuit denied the petition. Pet. App. 41a-42a.

REASONS FOR GRANTING THE PETITION

The First Circuit's decision deepens the divisions among the federal courts of appeals on important questions of law regarding the scope and applicability of the exemption contained in Section 1 of the FAA. *See* Sup. Ct. R. 10(a). First, the First Circuit's holding that applicability of the Section 1 exemption must be decided by a court (rather than an arbitrator), notwithstanding the parties' valid delegation clause, exacerbates a preexisting split between the Eighth and Ninth Circuits. Second, in holding that the Section 1 exemption applies to independent contractors as well as to employees, the First Circuit created a new conflict among the circuit courts and became an outlier jurisdiction.

This Court's review is required to establish uniform, national rules for these important questions of FAA interpretation. Without the ability to include enforceable arbitration provisions in contracts governing independent contractors, the entire transportation industry will be relegated to resolving all dis-

putes arising out of such contracts in court, notwithstanding the contrary intentions of the parties. This directly undercuts the principal advantages and efficiencies of arbitration, the importance of which this Court has repeatedly recognized, and contradicts the primary purpose of the FAA.

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT COURTS, DISTRICT COURTS, AND STATE APPELLATE COURTS.

Both of the First Circuit's holdings—(1) that courts must resolve the Section 1 exemption issue notwithstanding a valid delegation clause, and (2) that the Section 1 exemption applies to independent contractors—are in conflict with other courts around the nation, including decisions from the Eighth and Ninth Circuits and the California Court of Appeal. This Court's review is required to resolve these conflicts.

A. It is undisputed that the parties' arbitration agreement contains a valid delegation clause, stating that all issues of arbitrability must be resolved by the arbitrator. Pet. App. 55a (district court, finding that "the parties do not contest that the two operating agreements Oliveira signed . . . contain valid delegation provisions," which encompass "the arbitrability of disputes between the parties"). Moreover, there is no question that the arbitration agreements incorporate the American Arbitration Association's ("AAA's") rules, App. 102, 112, which expressly grant the arbitrator authority to determine his or her own jurisdiction, *see AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). Thus, it is "clear and unmistakable" that the parties agreed to arbitrate *every* gateway issue in a potential dispute. *Ibid.* Nevertheless, the First Circuit held that ap-

plicability of the Section 1 exemption—unique among all threshold issues of arbitrability—must be decided by a court and not an arbitrator. Pet. App. 35a.

That holding is in direct conflict with the Eighth Circuit's decision in *Green v. SuperShuttle, Int'l, Inc.*, 653 F.3d 766 (8th Cir. 2011), which held that application of the Section 1 exemption "is a threshold question of arbitrability" like any other. *Id.* at 769. There, like here, the contract "specifically incorporated" the AAA rules, which means that the parties "agreed to allow the arbitrator to determine threshold questions of arbitrability." *Ibid.* Thus, the Eighth Circuit held that the parties had agreed to submit *all* gateway questions of arbitrability to the arbitrator, including "whether the FAA's transportation worker exemption applied." *Ibid.*

The First Circuit's decision on this issue exacerbates a preexisting circuit split between the Eighth and Ninth Circuits. In *In re Van Dusen*, 654 F.3d 838 (9th Cir. 2011) ("*Van Dusen I*"), the Ninth Circuit held that a district court is required to assess whether the Section 1 exemption applies before ordering arbitration. *Id.* at 843. Thus, the decision below sides with the Ninth Circuit and against the Eighth Circuit.

This Court's review is warranted to resolve this split of authority.

B. More egregious is the First Circuit's holding that the FAA Section 1 exemption applies to independent contractors as well as employees. Pet. App. 35a. On this issue, the decision below breaks with the Ninth Circuit and conflicts with decisions of the California Court of Appeal and more than a dozen district courts around the country. Indeed, prior to the First Circuit's opinion in this case, courts uni-

formly understood the phrase "contracts of employment" in Section 1 to mean what it says: a contract between an employer and an employee—not an agreement with an independent contractor.

In *Van Dusen III*, 830 F.3d 913 (9th Cir. 2016), each of the Ninth Circuit panel members wrote separately to address the Section 1 exemption. Notwithstanding the splintered decision, all three panel members agreed that applicability of the Section 1 exemption turns on whether the plaintiff is an employee or independent contractor—they disagreed only with respect to the type of evidence on which the parties could rely in proving one or the other. *See id.* at 915 (per curiam) (denying writ of mandamus and allowing district court to proceed with discovery and a trial to determine whether plaintiff was an employee or independent contractor); *id.* at 920 (Ikuta, J., dissenting) ("Determining whether a contract qualifies as a 'contract of employment' requires a categorical approach that focuses solely on the words of the contract and the definition of the relevant category."); *id.* at 918 (Hurwitz, J., concurring) (explaining that if the case were a direct appeal, rather than a mandamus action, he "might agree" with the position "Judge Ikuta persuasively argues").

That same evidentiary debate is at issue in this case—Prime has argued throughout the lower court proceedings that the determination of Section 1 exemption applicability should be made (by an arbitrator) based solely on the words of the contract between the parties, whereas Oliveira has argued (and the district court agreed) that discovery is required to determine whether Oliveira is properly classified as an employee or independent contractor. Pet App. 61a. Yet the First Circuit's ruling rendered this en-

tire debate academic because, under that court's view, it does not matter whether the worker is an employee or an independent contractor—either way, the worker falls within the Section 1 exemption. Thus, the decision below is in direct conflict with the unanimous view of the Ninth Circuit *Van Dusen III* panel.

The California Court of Appeal also has held that applicability of the Section 1 exemption turns on whether the plaintiff is an employee or independent contractor. *See Performance Team Freight Sys., Inc. v. Aleman*, 241 Cal. App. 4th 1233 (Cal. Ct. App. 2015). As that court explained, "agreements characterizing truck drivers as independent contractors . . . should not be deemed 'contracts of employment' unless the party opposing arbitration demonstrates that they are such." *Id.* at 1241. Thus, in determining whether the Section 1 exemption applies, "[t]he question [is] whether a worker is an independent contractor or an employee[.]" *Id.* at 1242 (quoting *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341, 349 (Cal. 1989)). The First Circuit's decision is in direct conflict with that ruling as well.

In addition to departing from these appellate decisions, the First Circuit's ruling in this case conflicts with the unanimous decisions of more than a dozen district courts from around the country, all of which have held that independent contractor agreements are not "contracts of employment" for Section 1 purposes. *See, e.g.*, *Zambrano v. Strategic Delivery Sols., LLC*, 2016 WL 5339552, at *3 (S.D.N.Y. Sept. 22, 2016); *Diaz v. Mich. Logistics, Inc.*, 167 F. Supp. 3d 375, 380 (E.D.N.Y. 2016); *Aviles v. Quik Pick Express, LLC*, 2015 WL 5601824, at *6 (C.D. Cal. Sept.

23, 2015); *Morning Star Assocs., Inc. v. Unishippers Glob. Logistics, LLC*, 2015 WL 2408477, at *5 (S.D. Ga. May 20, 2015); *Doe v. Swift Transp. Co.*, 2015 WL 274092, at *3 (D. Ariz. Jan. 22, 2015); *Alvarado v. Pac. Motor Trucking Co.*, 2014 WL 3888184, at *4-5 (C.D. Cal. Aug. 7, 2014); *Villalpando v. Transguard Ins. Co. of Am.*, 17 F. Supp. 3d 969, 982 (N.D. Cal. 2014); *Carney v. JNJ Exp., Inc.*, 10 F. Supp. 3d 848, 852 (W.D. Tenn. 2014); *Port Drivers Fed. 18, Inc. v. All Saints*, 757 F. Supp. 2d 463, 472 (D.N.J. 2011); *Davis v. Larson Moving & Storage Co.*, 2008 WL 4755835, at *4 (D. Minn. Oct. 27, 2008); *Owner-Operator Indep. Drivers Ass'n v. United Van Lines, LLC*, 2006 WL 5003366, at *3 (E.D. Mo. Nov. 15, 2006); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co.*, 288 F. Supp. 2d 1033, 1035 (D. Ariz. 2003); *Roadway Package Sys., Inc. v. Kayser*, 1999 WL 817724, at *4 n.4 (E.D. Pa. Oct. 13, 1999).

The First Circuit is now a lone outlier on the scope of the Section 1 exemption. This Court's review is warranted to resolve this conflict as well.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

This Court's review is also warranted because the First Circuit's decision—which prevents an arbitrator from deciding an arbitrability issue under the FAA notwithstanding the parties' agreement to the contrary, and interprets the Section 1 exemption expansively to exempt the entire transportation industry from arbitration—is in direct conflict with this Court's precedents regarding both the Section 1 exemption and the FAA more broadly.

A. With respect to the delegation clause issue—*i.e.*, whether an arbitrator should decide if the Section 1 exemption applies—this Court has explained

that delegation clauses are simply "additional, antecedent agreement[s]" to arbitrate that must be enforced the same as any other arbitration agreement. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010). This Court's FAA jurisprudence has also commanded, over and over again, that "*any doubts* concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added); *see also Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468, 489 (1989); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). The FAA must be interpreted against the background principle that a bargained-for arbitration agreement is enforceable so long as the agreement is "susceptible of an interpretation that covers the asserted dispute." *AT&T Techs.*, 475 U.S. at 650. This exacting standard is necessary because courts must pay "due regard" to the liberal "federal policy favoring arbitration." *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (citation omitted); *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 338 (2011).

Indeed, the "overarching purpose" of the FAA is "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," *Concepcion*, 563 U.S. at 344, in order to "revers[e] centuries of judicial hostility to arbitration agreements," *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225 (1987) (citation omitted). As a result, this Court has repeatedly ruled that "courts must 'rigorously enforce' arbitration agreements"—including delegation clauses—"according to their terms." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (quot-

ing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)); *see also, e.g.*, *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985); *Moses H. Cone*, 460 U.S. at 25.

The First Circuit's decision in this case flouts these commands, ordering courts to decide an important arbitrability issue notwithstanding the parties' express agreement that an arbitrator should resolve the issue.

B. With respect to the scope of the Section 1 exemption—*i.e.*, whether "contracts of employment" include independent contractor agreements—this Court has held that the FAA "compel[s]" giving the Section 1 exemption "a narrow construction" and a "precise reading." *Circuit City*, 532 U.S. 105, 118, 119 (2001). That is because "the provision is contained in a statute that 'seeks broadly to overcome judicial hostility to arbitration agreements.'" *Ibid.* (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272-73 (1995)).

In *Circuit City*, this Court explained that the Section 1 exemption is limited to certain categories of workers who are tied together by the common features of *transportation* and *employment*:

> By the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their ***employers***, see Shipping Commissioners Act of 1872, 17 Stat. 262. When the FAA was adopted, moreover, grievance procedures existed for railroad ***employees*** under federal law, see Transportation Act of 1920, §§ 300-316, 41 Stat. 456 . . . . [And] legislation was soon to follow, with the

> amendment of the Railway Labor Act in 1936 to include air carriers and their ***employees***.

Circuit City, 532 U.S. at 121 (emphases added). These limitations make sense, this Court explained, because the purpose of Section 1 is to avoid conflicts with other federal statutes that provide their own alternative dispute-resolution mechanisms for certain kinds of employees, such as "seamen," "railroad employees," and "air carriers and their employees." *Id.* at 120-21.

Those other federal statutes do not reach independent contractors, and therefore it would have made little sense for Congress to have included independent contractors in Section 1's exemption provision. *See Circuit City*, 532 U.S. at 121 (citing the Shipping Commissioners Act of 1872, 17 Stat. 262; Transportation Act of 1920, 41 Stat. 456; and Railway Labor Act of 1926, 44 Stat. 577); *see also* Railway Labor Act of 1926, § 1, Pub. L. No. 69-257, 44 Stat. 577 ("[t]he term 'employee' as used herein includes every person in the service of a carrier (*subject to its continuing authority to supervise and direct the manner of rendition of his service*) who performs any work defined as that of an employee or subordinate official") (emphasis added); Federal Employers' Liability Act, 45 U.S.C. § 51 (enacted 1908) (applies only to "employee[s]" who are injured "while . . . employed by" a "common carrier by railroad"); Jones Act, 46 U.S.C. § 30104 (formerly codified at 46 U.S.C. § 688) (enacted 1920) ("[a] seaman injured in the course of *employment* . . . may elect to bring a civil action at law . . . against the *employer*") (emphasis added).

As a result, this Court held in *Circuit City* that "Section 1 exempts from the FAA only contracts of ***employment*** of transportation workers," rejecting any

"expansive construction of the FAA's exclusion provision that goes beyond the meaning of the words Congress used." 532 U.S. at 119 (emphasis added); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 319-21 (1992) (when Congress uses the term "employee" in a statute without "defin[ing] it," Congress means "to incorporate traditional agency law criteria for identifying master-servant relationships"); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (same).

The Court also interpreted the Section 1 exemption narrowly in its only other case examining that provision. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court concluded that the term "contracts of employment" does not include agreements mandating that an employee arbitrate employment-related disputes with his employer if the employer is not a party to the contract. *Id.* at 25 n.2. Taken together, *Circuit City* and *Gilmer* leave no doubt that the Section 1 exemption, and the term "contracts of employment" appearing therein, must not be interpreted any more broadly than is absolutely necessary, always keeping in mind that the overriding purpose of the FAA is to foster and support arbitration.

The First Circuit's contra-textual reading of "contracts of employment" in Section 1 to include contracts of *non*-employment (*i.e.*, independent-contractor agreements) contradicts this Court's clear commands regarding interpretation of the very same provision, as well as this Court's repeated recognition of "the common understanding . . . of the difference between an employee and an independent contractor." *Darden*, 503 U.S. at 327. Indeed, the court of appeals acknowledged that *Black's Law Dictionary*

treats "contract of employment" as synonymous with "employment contract," the first usage of which was in 1927, and defines the term in the commonsense way to mean a "contract between an employer and employee in which the terms and conditions of employment are stated." Pet. App. 26a (quoting *Black's Law Dictionary* (10th ed. 2014)).

That should have been the end of the First Circuit's inquiry. Yet the court sought out all manner of other sources from contexts beyond the FAA in an effort to shoehorn independent-contractor agreements into the term "contracts of employment." Op. 27-31. That is the antithesis of the approach this Court has mandated.

III. The First Circuit's Decision Has Sweeping Implications For The Transportation Industry.

The decision below makes the First Circuit an outlier on an issue of national importance: The efficient resolution of disputes between companies and independent contractors in the national and international transportation industry. Without this Court's review, *no* dispute arising out of *any* working relationship in the entire transportation sector could ever be compelled to arbitration under the FAA within the First Circuit—no matter how explicit a mutual agreement to the contrary. As the dissenting judge warned (Pet. App. 37a), the First Circuit's categorical ruling leads to significant "over- and under-inclusiveness concerns"—the opposite result one should expect when applying a provision of the FAA that must be interpreted with "precis[ion]." *Circuit City*, 532 U.S. at 118-19.

Independent contractors have long played a critical role in the trucking industry. *See Am. Trucking*

Ass'ns, Inc. v. United States, 344 U.S. 298, 303 (1953) ("Carriers . . . have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands."). Without the ability to include enforceable arbitration provisions in the contracts governing independent contractors, this entire industry will be relegated to resolving all disputes arising out of working relationships in court, thereby undercutting the "principal advantage of arbitration—its informality," and "mak[ing] the process slower [and] more costly." *Concepcion*, 563 U.S. at 348; *see also, e.g., id.* at 344 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."); *Italian Colors*, 133 S. Ct. at 2312 (rejecting an interpretation of the FAA that would "sacrifice[] the principal advantage of arbitration" (citation omitted)); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) ("benefits of private dispute resolution" include "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes").

This outcome could not be more at odds with the FAA's insistence that courts honor parties' agreements to arbitrate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JASON C. SCHWARTZ
JOSHUA S. LIPSHUTZ
AMANDA C. MACHIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

THEODORE J. BOUTROUS JR.
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Counsel for Petitioner

September 1, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

DOMINIC OLIVEIRA, on his behalf and on behalf of all others similarly situated *Plaintiff-Appellee*, v. NEW PRIME, INC., *Defendant-Appellant*.	No. 15-2364

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Patti B. Saris, U.S. District Judge]

Before

Thompson and Kayatta, Circuit Judges,
and Barbadoro,* District Judge.

Theodore J. Boutrous, Jr., with whom Joshua S. Lipshutz, Jason C. Schwartz, Thomas M. Johnson, Jr., Lindsay S. See, Gibson, Dunn & Crutcher LLP,

* Of the District of New Hampshire, sitting by designation.

William E. Quirk, James C. Sullivan, Robert J. Hingula, Polsinelli PC, Judith A. Leggett, and Leggett Law Firm, P.C. were on brief, for appellant.

Jennifer D. Bennett, with whom Public Justice, P.C., Hillary Schwab, Fair Work, P.C., Andrew Schmidt, and Andrew Schmidt Law, PLLC were on brief, for appellee.

Richard Frankel on brief for amicus curiae in support of appellee.

May 12, 2017

THOMPSON, Circuit Judge. This case raises two questions of first impression in this circuit. First, when a federal district court is confronted with a motion to compel arbitration under the Federal Arbitration Act (FAA or Act), 9 U.S.C. §§ 1-16, in a case where the parties have delegated questions of arbitrability to the arbitrator, must the court first determine whether the FAA applies or must it grant the motion and let the arbitrator determine the applicability of the Act? We hold that the applicability of the FAA is a threshold question for the court to determine before compelling arbitration under the Act. Second, we must decide whether a provision of the FAA that exempts contracts of employment of transportation workers from the Act's coverage, see id. § 1 (the § 1 exemption), applies to a transportation-worker agreement that establishes or purports to establish an independent-contractor relationship. We answer this question in the affirmative. Accordingly, we affirm the

district court's order denying the motion to compel arbitration and dismiss this appeal for lack of appellate jurisdiction.

Background[1]

The defendant, New Prime, Inc. (Prime), operates an interstate trucking company. Under its Student Truck Driver Program (apprenticeship program), Prime recruits and trains new drivers. Prime touts its program as offering "[p]aid [a]pprenticeship [Commercial Driver's License (CDL)] [t]raining." After attending a four-day orientation, student drivers hit the road with a Prime truck driver, who acts as an on-the-job instructor. In this phase of the apprenticeship program, student drivers must log 10,000 miles as a driver or passenger, and, apart from an advance of $200 per week for food (which eventually must be repaid), the apprentices are not paid.[2] After completing

---

[1] Because the motion to compel arbitration was made in connection with a motion to dismiss or stay, we glean the relevant facts from the operative complaint and the documents submitted to the district court in support of the motion. See Gove v. Career Sys. Dev. Corp., 689 F.3d 1, 2 (1st Cir. 2012).

[2] This arrangement allows Prime to transport its shipments in a more economical and efficient manner. Under United States Department of Transportation regulations, a truck driver's "[o]n-duty time" includes "[a]ll driving time" as well as a host of other non-driving tasks, including time spent supervising a student driver who is behind the wheel. 49 C.F.R. § 395.2.In any fourteen-hour period of on-duty time, a truck driver has only eleven hours of driving time. Id. § 395.3(a)(2)-(3)(i). After a Prime instructor driver has maxed out his or her eleven hours of driving time, the instructor driver still has three more hours of on-duty time remaining. Thus, once an instructor driver has exhausted his or her own driving time, a student driver can drive the truck toward its ultimate destination for up to three more hours, and

the supervised-driving period, the student driver takes the examination for a CDL and then must drive 30,000 more miles as a B2 company driver trainee (B2 trainee). Prime pays its B2 trainees fourteen cents per mile. At the conclusion of the B2 trainee portion of the apprenticeship program, the apprentices attend the district court in support of the motion. See Gove v. Career Sys. Dev. Corp., 689 F.3d 1, 2 (1st Cir. 2012). additional orientation classes for approximately one week. Apprentices are not paid for time spent in this orientation.

The plaintiff, Dominic Oliveira, is an alum of Prime's apprenticeship program. He was not paid for the time he spent in orientation and was paid on a per-mile basis while driving as a B2 trainee, although Prime docked his pay during this period to recoup the $200 advances that it paid him during the supervised-driving period.

Drivers are relieved of paying tuition for the apprenticeship program as long as they remain with Prime for one year as either company drivers or independent contractors. After completing the program, drivers choose between the two options, and Prime offers a $100 bonus to those who elect independent- contractor status. When Oliveira finished the apprenticeship program, Prime representatives informed him that he would make more money as an independent contractor than a company driver. Prime directed Oliveira to Abacus Accounting (Abacus) — a company with offices on the second floor of Prime's building — to assist him in forming a limited liability company

---

Prime does not pay the student driver for this bonus driving time.

(LLC). After Oliveira filled out a form provided by Abacus and listed his preferred LLC names, Abacus created Hallmark Trucking LLC (Hallmark) on Oliveira's behalf.

Prime then directed Oliveira to the offices of Success Leasing (Success) — located on the first floor of the same building — for help in securing a truck. After selecting a truck, Oliveira was informed that his first load of freight was ready to be trucked for Prime, and he was instructed to sign the highlighted portions of several documents before hitting the road. He hastily did so, and Prime then steered him towards its company store, where he purchased — on credit — $5,000 worth of truck equipment and fuel.

Among the documents Oliveira signed was an Independent Contractor Operating Agreement (the contract) between Prime and Hallmark.[3] The contract specified that the relationship between the parties was that "of carrier and independent contractor and not an employer/employee relationship" and that "[Oliveira is] and shall be deemed for all purposes to be an independent contractor, not an employee of Prime."[4] Additionally, under the contract, Oliveira retained the rights to provide transportation services to

---

[3] Around ten months later, Hallmark and Prime executed another Independent Contractor Operating Agreement. Because the pertinent language of the two agreements is identical, we refer to them collectively as "the contract." When quoting the contract in this opinion, we omit any unnecessary capitalization.

[4] Although the contract was between Prime and Hallmark, Prime has — with one small exception discussed below, see note 15, infra — treated the contract as one between Prime and Oliveira. We similarly treat Oliveira and Hallmark interchangeably.

companies besides Prime,[5] refuse to haul any load offered by Prime, and determine his own driving times and delivery routes. The contract also obligated Oliveira to pay all operating and maintenance expenses, including taxes, incurred in connection with his use of the truck leased from Success. Finally, the contract contained an arbitration clause under which the parties agreed to arbitrate "any disputes arising under, arising out of or relating to [the contract], . . . including the arbitrability of disputes between the parties."[6]

Oliveira alleges that, during his Hallmark days, Prime exercised significant control over his work. According to Oliveira, Prime required him to transport Prime shipments, mandated that he complete Prime training courses and abide by its procedures, and controlled his schedule. Because of Prime's pervasive involvement in his trucking operation, Oliveira was unable to work for any other trucking or shipping companies.

Prime consistently shortchanged Oliveira during his time as an independent contractor. Eventually, Oliveira — frustrated and, he alleges, unlawfully underpaid — stopped driving for Prime. It was a short-lived separation, however; Prime rehired Oliveira a month later, this time as a company driver. Oliveira alleges that his job responsibilities as a company

---

[5] Before he could drive for another carrier, however, Oliveira was contractually obligated to give Prime five days' advance notice and to "remove all identification devices, licenses and base plates from the [truck] and return [them] to Prime."

[6] The arbitration provision also specified that "arbitration between the parties will be governed by the Commercial Arbitration Rules of the American Arbitration Association [(AAA)]."

driver were "substantially identical" to those he had as an independent contractor. Job responsibilities were not the only constant; Oliveira's pay as a company driver was as paltry as ever.

Oliveira filed this class action against Prime, alleging that Prime violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, as well as the Missouri minimum-wage statute, by failing to pay its truck drivers minimum wage. Oliveira also asserted a class claim for breach of contract or unjust enrichment and an individual claim for violation of Maine labor statutes. Prime moved to compel arbitration under the FAA and stay the proceedings or, alternatively, to dismiss the complaint for improper venue and the breach of contract/unjust enrichment count for failure to state a claim upon which relief may be granted.[7] In its motion, Prime asserted that "Oliveira . . . entered into an Independent Contractor Operating Agreement with . . . Prime . . . to work as an owner-operator truck driver." (Emphasis added.)

In response, Oliveira argued that, because he was not a party to the contract between Prime and Hallmark, he could not be personally bound by any of its provisions, including the arbitration clause. He further contended that the motion to compel arbitration should be denied because, among other reasons, the contract is exempted from the FAA under § 1. He also argued that the question of the applicability of the § 1 exemption was one for the court, and not an arbitrator, to decide.

---

[7] Because the district court never addressed the alternative arguments for dismissal and Prime has not pressed them on appeal, we focus only on the motion to compel arbitration.

Prime disputed Oliveira's argument that he could not be personally bound by the contract between Prime and Hallmark, stating that "Oliveira and Hallmark Trucking are factually one and the same." Prime also took issue with both of Oliveira's other arguments, contending that the § 1 exemption does not include independent-contractor agreements and, in any event, the question of whether the § 1 exemption applies is a question of arbitrability that the parties had delegated to the arbitrator.[8]

The district court proceeded straight to the FAA issues and concluded that the question of the applicability of the § 1 exemption was for the court, and not an arbitrator, to decide. And it determined that it could not yet answer that question because (1) the "contracts of employment" language of the § 1 exemption does not extend to independent contractors; and (2) discovery was needed on the issue of whether Oliveira was a Prime employee or an independent contractor before the court could decide whether the contract was a contract of employment under the § 1 exemption.[9] The district court therefore denied Prime's motion to compel arbitration without prejudice and permitted the parties to conduct discovery on

---

[8] The parties also squabbled over whether Oliveira's claims arising from periods of time in which the contract was not in effect — during Oliveira's pre-contract time in the apprenticeship program and his post-contract stint as a company driver — were arbitrable under the arbitration clause of the contract. The district court did not resolve the issue, electing instead to focus on the question of whether the § 1 exemption applied.

[9] The district court noted that the parties did not dispute that Oliveira, as a truck driver, was a transportation worker under the § 1 exemption.

Oliveira's employment status. Prime timely appealed.[10]

Analysis

The FAA lies at the center of the two questions raised by this appeal. Thus, before tackling those questions, we first briefly outline the statutory framework.

To combat deep-rooted judicial hostility towards arbitration agreements, Congress enacted the FAA in 1925. **See Circuit City Stores, Inc.** v. Adams, 532 U.S. 105, 111 (2001). Section 2 of the FAA enshrines the "liberal federal policy favoring arbitration agreements," **Moses H. Cone Mem'l Hosp.** v. **Mercury Constr. Corp.**, 460 U.S. 1, 24 (1983), by declaring that an arbitration agreement in "a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2.

And the FAA does not simply talk the talk. Instead, two separate provisions provide the bite to back up § 2's bark. **See Rent-A-Ctr., W., Inc.** v. Jackson, 561 U.S. 63, 70 (2010). First, under § 3, a party may obtain a stay of federal-court litigation pending arbitration. See 9 U.S.C. § 3. Second, § 4 authorizes district courts to grant motions to compel arbitration. See id. § 4.

---

[10] Although interlocutory orders are ordinarily not immediately appealable, the FAA permits immediate appeal from an order denying a motion to compel arbitration. See 9 U.S.C. § 16(a)(1)(B); Gove, 689 F.3d at 3-4 n.1. We review the denial of a motion to compel arbitration de novo. Gove, 689 F.3d at 4.

The scope of the FAA, however, is not unbounded. Section 1 of the FAA provides that the Act shall not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Id. § 1. The Supreme Court has interpreted this section to "exempt[] from the FAA . . . contracts of employment of transportation workers." Circuit City, 532 U.S. at 119.

This case presents us with two questions pertaining to the § 1 exemption. We address each question in turn.

A. Who Decides Whether the § 1 Exemption Applies?

The question of whether the district court or the arbitrator decides the applicability of the § 1 exemption is one of first impression in this circuit. The parties champion dueling out-of-circuit precedent in support of their respective positions on this issue. Relying on the Eighth Circuit's decision in Green v. SuperShuttle International, Inc., 653 F.3d 766 (8th Cir. 2011), Prime argues that the question of whether the § 1 exemption applies is a question of arbitrability that must be decided by the arbitrator where, as here, the parties have delegated such questions to the arbitrator.

In Green, the plaintiffs, a class of shuttle-bus drivers, alleged that the defendant, a shuttle-bus company, misclassified the drivers as franchisees instead of classifying them as employees. 653 F.3d at 767-68. When the defendant moved under the FAA to compel arbitration pursuant to the arbitration clause contained in the parties' contracts, the plaintiffs countered that their contract was outside the scope of the

FAA by virtue of the § 1 exemption. Id. at 768. The Eighth Circuit upheld the district court's grant of the defendant's motion, concluding that "[a]pplication of the FAA's transportation worker exemption is a threshold question of arbitrability" in the parties' dispute. Id. at 769. Because the parties' agreements incorporated the AAA rules, which provide that the arbitrator has the power to determine his or her own jurisdiction, the court concluded that the parties agreed to allow the arbitrator to determine threshold questions of arbitrability, including the applicability of the § 1 exemption. Id.

With Green as its guide, Prime offers several reasons why the question of § 1's applicability is one for the arbitrator to determine, but each of these arguments flows from the Green court's characterization of this issue as a question of arbitrability. The case on which Oliveira relies — the Ninth Circuit's decision in In re Van Dusen, 654 F.3d 838 (9th Cir. 2011) — considered this characterization to be a flawed starting premise.

Van Dusen arose on facts strikingly similar to those in this case; the plaintiffs, interstate truck drivers, alleged that one of the defendants, a trucking company, misclassified its truck drivers as independent contractors to circumvent the requirements of the FLSA and parallel state laws. See id. at 840; see also Van Dusen v. Swift Transp. Co., 830 F.3d 893, 895 (9th Cir. 2016) (later appeal in same case). The defendant moved to compel arbitration under the FAA, and the plaintiffs opposed that motion, asserting that the § 1 exemption applied to their contracts. Van Dusen, 654 F.3d at 840. The district court ordered arbitration, concluding that the question of whether the

§ 1 exemption applied was one for the arbitrator to decide in the first instance. Id. After the district court refused the plaintiffs' request for certification of an interlocutory appeal, the plaintiffs sought mandamus relief before the Ninth Circuit. Id.

The Ninth Circuit ultimately declined to issue the extraordinary remedy of mandamus relief because the district court's conclusion was not clearly erroneous in light of the dearth of federal appellate authority addressing the issue and the general federal policy in favor of arbitration. Id. at 845-46. The court nonetheless outlined why "the best reading of the law requires the district court to assess whether [the §] 1 exemption applies before ordering arbitration" under the FAA. Id. at 846. The court explained that, because a district court's authority to compel arbitration under the FAA exists only where the Act applies, "a district court has no authority to compel arbitration under Section 4 [of the FAA] where Section 1 exempts the underlying contract from the FAA's provisions." Id. at 843. The court elaborated:

> In essence, [the d]efendants and the [d]istrict [c]ourt have adopted the position that contracting parties may invoke the authority of the FAA to decide the question of whether the parties can invoke the authority of the *FAA*. This position puts the cart before the horse: Section 4 has simply no applicability where Section 1 exempts a contract from the FAA, and private contracting parties cannot, through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold.

Id. at 844. The court also concluded that the question of whether the § 1 exemption applies "does not fit within th[e] definition" of "questions of arbitrability." Id.

After careful consideration of these competing cases, we are persuaded that the Ninth Circuit hit the nail on the head, and we therefore hold that the issue of whether the § 1 exemption applies presents a question of "whether the FAA confers authority on the district court to compel arbitration" and not a question of arbitrability. Id.

"The Supreme Court defines 'questions of arbitrability' as questions of 'whether the parties have submitted a particular dispute to arbitration.'" Id. (quoting Howsam v. **Dean Witter Reynolds, Inc.**, 537 U.S. 79, 83 (2002)); **see also Rent-A-Ctr.**, 561 U.S. at 68-69 ("[P]arties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy."); *Arbitrability*, **Black's Law Dictionary** (10th ed. 2014) (defining arbitrability as "[t]he status, under applicable law, of a dispute's being or not being resolvable by arbitrators because of the subject matter"). In this case, determining whether the § 1 exemption applies to the contract does not entail any consideration of whether Prime and Oliveira have agreed to submit a dispute to arbitration; instead, it raises the "distinct inquiry" of whether the district court has the authority to act under the FAA — specifically, the authority under § 4 to compel the parties to engage in arbitration. Van Dusen, 654 F.3d at 844.

Therefore, as the Ninth Circuit explained in Van Dusen, the question of the court's authority to act under the FAA is an "antecedent determination" for the district court to make before it can compel arbitration under the Act. Id. at 843. Prime's argument to the contrary "puts the cart before the horse" and makes no sense. Id. at 844. The following scenario readily demonstrates why this is so: First, assume that two parties enter into a contract containing an arbitration clause with language identical to that contained in the contract in this case, including a provision delegating questions of arbitrability to the arbitrator. Second, assume that, unlike in this case, the parties are in agreement that the contract involved is clearly a contract of employment of a transportation worker. Third, assume that, as in this case, one of the parties, relying solely on the FAA, moves to compel arbitration. Taking Prime's position to its logical conclusion, the district court would be obligated to grant the motion because the parties have agreed to allow the arbitrator to decide questions of arbitrability, including whether the § 1 exemption applies. See Green, 653 F.3d at 769. This would be so even though the § 1 exemption indisputably applies to the contract, such that the district court had no authority to act under the FAA in the first place. See Van Dusen, 654 F.3d at 843 ("[A] district court has no authority to compel arbitration under Section 4 where Section 1 exempts the underlying contract from the FAA's provisions.").[11]

---

[11] When confronted with the logical extreme of its position at oral argument, Prime sought to qualify it to some degree. Prime insisted that, so long as the party seeking to compel arbitration had a good-faith basis for asserting that the § 1 exemption did

This position cannot be correct. When the only basis for seeking arbitration in federal court is the FAA, the district court can grant the requested relief only if it has authority to act under the FAA. See id. at 843. If the FAA does not apply, "private contracting parties cannot, through the insertion of a delegation clause, confer authority upon a district court [i.e., to compel arbitration under the FAA] that Congress chose to withhold." Id. at 844. Therefore, "the district court must make an antecedent determination that a contract is arbitrable under Section 1 of the FAA before ordering arbitration pursuant to Section 4." Id. at 843.

Because we reject Green's starting premise — that the issue of § 1's applicability is a question of arbitrability — we are unpersuaded by Green's reliance on a contract's incorporation of the AAA rules, which allow an arbitrator to determine his or her own jurisdiction. Where, as here, the parties dispute whether the district court has the authority to compel arbitration under the FAA, the extent of the arbitrator's jurisdiction is of no concern. Instead, we are concerned only with the question of whether the district court has authority to act under a federal statute. Nothing in the AAA rules — including the power to determine the arbitrator's jurisdiction — purports to allow the

---

not apply, the question of the applicability of the § 1 exemption would need to be arbitrated under the delegation clause of the arbitration agreement. But, even with this minor qualification, Prime's position still boils down to the conclusion that the district court can compel arbitration under the FAA before determining whether it has authority to act under the FAA, even in a case where it might not have such authority. We do not accept this position.

arbitrator to decide whether a federal district court has the authority to act under a federal statute.[12]

For all these reasons, we join our colleagues on the Ninth Circuit and hold that the question of whether the § 1 exemption applies is an antecedent determination that must be made by the district court before arbitration can be compelled under the FAA. But we can't stop there.

---

[12] We are likewise unmoved by each of Prime's subsidiary arguments, all of which are grounded on the question-of arbitrability premise that we reject. For example, Prime's invocation of the liberal federal policy in favor of arbitration and its corollary, the principle that any doubts about the scope of arbitrable issues should be resolved in favor of arbitration, goes nowhere because we are not confronted with a scope question. See Paul Revere Variable Annuity Ins. Co. v. Kirschhofer, 226 F.3d 15, 25-26 (1st Cir. 2000). Similarly, Prime's argument that, so long as the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," 9 U.S.C. § 4, the court must compel arbitration overlooks that one does not even approach the § 4 inquiry until one first determines that the § 1 exemption does not apply. See Van Dusen, 654 F.3d at 843-44. Finally, Prime's effort to compare the question of the applicability of the § 1 exemption to questions concerning the validity of an agreement or whether it can be enforced by the party seeking to compel arbitration — questions that can be referred to the arbitrator — is unavailing. Issues concerning alleged flaws with an agreement's validity or enforceability are fundamentally different than the issue of the district court's authority to act under the FAA in the first place. See id. at 844 ("[P]rivate contracting parties cannot, through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold."). Additionally, it is not unusual for a court to first decide a specific challenge to the validity or enforceability of the arbitration clause that a party is seeking to enforce. See Rent-A-Ctr., 561 U.S. at 71; Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967).

B. Independent Contractors and the § 1 Exemption

After concluding that it must decide for itself whether the § 1 exemption applies, the district court in this case ordered the parties to conduct factual discovery to determine whether Oliveira was truly an independent contractor or instead was in reality a Prime employee during the time that the contract was in place. Discovery on that issue was necessary, in the court's view, because "courts generally agree that the § 1 exemption does not extend to independent contractors."

On appeal, both parties challenge this aspect of the district court's order. Prime agrees that § 1 does not extend to independent contractors, but it argues that discovery on the relationship between the parties is inappropriate because Oliveira's status as a Prime employee or independent contractor should be decided by the arbitrator. See **AT&T Techs., Inc.** v. Comm'cns Workers of Am., 475 U.S. 643, 649 (1986) ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims."). Alternatively, Prime argues that if the district court must determine whether the § 1 exemption applies, it should consider only whether the face of the contract demonstrates an intent to make Oliveira an independent contractor. Oliveira, on the other hand, argues that the § 1 exemption covers the employment contracts of "all transportation workers, including independent contractors." If we agree with Oliveira, discovery is not needed.

Thus, the question presented is whether the § 1 exemption extends to transportation-worker agreements that establish or purport to establish independent-contractor relationships, and we review this issue of statutory interpretation de novo.[13] See United States v. Maldonado-Burgos, 844 F.3d 339, 340 (1st

---

[13] We have considered the possibility, proposed by our dissenting colleague, of remanding without deciding this question of statutory interpretation. The benefit of this approach, according to the dissent, would be avoiding this difficult legal question now on the chance that the discovery contemplated by the district court might lead to a conclusion that Oliveira is not an independent contractor — a conclusion that would moot, for this case, the question whether independent contractors are within the exemption. But we do not view this approach as a viable option because the district court ordered discovery based on its legal conclusion that "the § 1 exemption does not extend to independent contractors." If that legal conclusion is incorrect — an issue that Oliveira sufficiently raised below and both parties have briefed on appeal — there is no need for discovery in the first place. Therefore, we will not adopt an approach that assumes away one of the live issues on appeal simply because the issue is a difficult one. Cf. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring) ("It should go without saying . . . that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right. Thus while it is true that '[i]f it is not necessary to decide more, it is necessary not to decide more,' . . . sometimes it is necessary to decide more. There is a difference between judicial restraint and judicial abdication."). Finally, we note that we are not convinced that the dissent's approach in fact provides a narrower ground of decision; such an approach would require us to address Prime's contention (which the dissent implicitly rejects) that discovery on the parties' relationship would render the contractual right to arbitration a nullity. Addressing that contention would present its own set of challenges, but, given the manner in which we decide the statutory-interpretation question, that issue is the one that need not be decided in this appeal.

Cir. 2016). As always, the statutory text is our starting point. See id. The § 1 exemption provides that nothing contained in the FAA "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). The Supreme Court has declared that "[§] 1 exempts from the FAA only contracts of employment of transportation workers." Circuit City, 532 U.S. at 119.

Before embarking on our analysis, we first identify two issues that we need not decide. First, Prime does not dispute that Oliveira, whose work for Prime included driving a truck across state lines, is a "transportation worker" within the meaning of the § 1 exemption, as interpreted by Circuit City.[14] Thus, we

---

[14] The district court's decision indicated that the parties did not dispute this issue. Similarly, Prime did not argue in its opening brief that Oliveira is not a transportation worker. In a single sentence in its reply brief, Prime asserts that this court "has never extended the [§] 1 [e]xemption to truck drivers, as opposed to rail workers and seamen (the core workers of concern when Congress enacted the exemption)." To the extent that Prime intended this lone sentence to resurrect the transportation-worker issue in this case, we will not allow it. Any such "argument" is wholly undeveloped, see United States v. Sevilla-Oyola, 770 F.3d 1, 13 (1st Cir. 2014) ("Arguments raised in only a perfunctory and undeveloped manner are deemed waived on appeal."), and, moreover, an argument that makes its debut in a reply brief will not receive a warm ovation from us, see United States v. Arroyo-Blas, 783 F.3d 361, 366 n.5 (1st Cir. 2015) ("[A] legal argument made for the first time in an appellant's reply brief comes too late and need not be addressed." (quoting United States v. Brennan, 994 F.2d 918, 922 n.7 (1st Cir. 1993))). Finally, we note in passing that Prime's position has not been accepted elsewhere. See, e.g., Lenz v. Yellow Transp., Inc., 431 F.3d 348, 351 (8th Cir. 2005) ("Indisputably, if Lenz were a truck driver, he would be considered a

have no need to definitively decide that issue. Second, we note that, although the parties to the contract are Prime and Hallmark, Prime has, both below and on appeal, treated the contract as one between Oliveira and Prime.[15] We do the same. Therefore, because the parties do not dispute that Oliveira is a transportation worker under § 1, we need not address whether an LLC or other corporate entity can itself qualify as a transportation worker. We also need not address the scope of the word "worker" in the residual clause of the § 1 exemption. Accordingly, we limit our focus to the issue of whether an agreement between a trucking company and an individual transportation worker cannot be a "contract of employment" within the

---

transportation worker under § 1 of the FAA."); Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001) ("As a delivery driver for RPS, Harden contracted to deliver packages 'throughout the United States, with connecting international service.' Thus, he engaged in interstate commerce that is exempt from the FAA.").

[15] Before the district court, Prime opposed Oliveira's argument that he could not be personally bound by the terms of the contract between Prime and Hallmark by arguing that "Oliveira and Hallmark Trucking are factually one and the same." Along similar lines, Prime stated in its opening brief that "Oliveira entered into an Independent Contractor Operating Agreement . . . with Prime" (emphasis added), and its brief proceeded on the assumption that Oliveira and Hallmark were interchangeable. In its reply brief, for the first time in this case, Prime relies on the fact that the contract was between Prime and Hallmark in arguing that the contract established an independent-contractor relationship. We need not decide whether Prime is judicially estopped from taking this position at this late juncture; it suffices that a reply brief is not the appropriate place to switch gears and offer new arguments. See Arroyo-Blas, 783 F.3d at 366 n.5.

meaning of § 1 if the agreement establishes or purports to establish an independent-contractor relationship.

Prime points out that the weight of district-court authority to consider the issue has concluded that the § 1 exemption does not extend to contracts that establish or purport to establish an independent-contractor relationship.[16] Several of these decisions simply assume, explicitly or implicitly, that independent-contractor agreements are not contracts of employment under § 1. See, e.g., Aviles, 2015 WL 5601824, at *6;

---

[16] See, e.g., Aviles v. **Quik Pick Express, LLC**, No. CV-15-5214-MWF (AGR), 2015 WL 5601824, at *6 (C.D. Cal. Sept. 23, 2015); Morning Star Assocs., Inc. v. **Unishippers Glob. Logistics, LLC**, No. CV-115-033, 2015 WL 2408477, at *5-7 (S.D. Ga. May 20, 2015); Doe v. **Swift Transp. Co.**, No. 2:10-cv-00899 JWS, 2015 WL 274092, at *3 (D. Ariz. Jan. 22, 2015); Alvarado v. Pac. Motor Trucking Co., No. EDCV 14-0504-DOC(DTBx), 2014 WL 3888184, at *4-5 (C.D. Cal. Aug. 7, 2014); Villalpando v. Transguard Ins. Co. of Am., 17 F. Supp. 3d 969, 982 (N.D. Cal. 2014); Carney v. JNJ Express, Inc., 10 F. Supp. 3d 848, 852 (W.D. Tenn. 2014); **Port Drivers Fed'n 18, Inc.** v. All Saints, 757 F. Supp. 2d 463, 472 (D.N.J. 2011); Davis v. **Larson Moving & Storage Co.**, Civ. No. 08-1408 (JNE/JJG), 2008 WL 4755835, at *4 (D. Minn. Oct. 27, 2008); **Owner-Operator Indep. Drivers Ass'n** v. United Van Lines, LLC, No. 4:06CV219 JCH, 2006 WL 5003366, at *3 (E.D. Mo. Nov. 15, 2006); **Owner-Operator Indep. Drivers Ass'n** v. **Swift Transp. Co.**, 288 F. Supp. 2d 1033, 1035-36 (D. Ariz. 2003); **Roadway Package Sys., Inc.** v. Kayser, No. CIV. A. 99-MC-111, 1999 WL 817724, at *4 n.4 (E.D. Pa. Oct. 13, 1999); see also **Performance Team Freight Sys., Inc. v. Aleman, 194** Cal. Rptr. **3d 530, 536-37 (Cal. Ct. App. 2015); Johnson v. Noble**, 608 N.E.2d 537, 540 (Ill. App. Ct. 1992); cf. Bell v. **Atl. Trucking Co.**, No. 3:09-cv-406-J-32MCR, 2009 WL 4730564, at *4-6 (M.D. Fla. Dec. 7, 2009) (conducting analysis on applicability of § 1 exemption on assumption it does not apply to independent contractors).

Doe, 2015 WL 274092, at *3; **Villalpando**, 17 F. Supp. 3d at 982; Bell, 2009 WL 4730564, at *4-6; Davis, 2008 WL 4755835, at *4; Kayser, 1999 WL 817724, at *4 n.4; **see also Johnson**, 608 N.E.2d at 540.[17] Other courts have "simply go[ne] along with the developing group consensus," **In re Atlas IT Exp. Corp.**, 761 F.3d 177, 183 (1st Cir. 2014), without adding any independent analysis. See, e.g., **Alvarado**, 2014 WL 3888184, at *4-5; Carney, 10 F. Supp. 3d at 853; **All Saints**, 757 F. Supp. 2d at 472; **see also** Aleman, 194 Cal. Rptr. 3d at 536-37. The few district-court decisions that offer independent analysis to support the conclusion that

---

[17] This assumption was implicit in Judge Ikuta's dissenting opinion in In re Swift Transportation Co., 830 F.3d 913 (9th Cir. 2016). The majority in Swift determined that mandamus relief was not warranted because the district court's proposed course of action — "resolv[ing] the § 1 question through discovery and a trial" — was not clearly erroneous; the district court's decision was not contrary to any Supreme Court or Ninth Circuit precedent, and "there [did] not appear to be any decisions from [the other] circuits on the question of whether the FAA compels a certain procedural choice in a district court's § 1 determination." Id. at 917. Judge Ikuta dissented, expressing her belief that the § 1 determination should be made solely from an examination of the contract's terms. Id. at 920-21 (Ikuta, J., dissenting). Implicit in Judge Ikuta's dissent is the assumption that independent-contractor agreements are not contracts of employment under the FAA. But there was good reason for that assumption in the circumstances of that case: Unlike in this case, none of the litigants argued that independent-contractor agreements of transportation workers are contracts of employment. And the district court in that case simply assumed — with no analysis or citation to authority — that the § 1 exemption covered only contracts between employers and employees. See Doe, 2015 WL 274092, at *3 ("Whether the parties formed an employment contract — that is whether plaintiffs were hired as employees — necessarily involves a factual inquiry apart from the contract itself.").

the § 1 exemption does not cover independent-contractor agreements have, viewed collectively, offered two reasons for that conclusion: first, that this interpretation is consistent with the "strong and liberal federal policy favoring arbitral dispute resolution," Swift Transp., 288 F. Supp. 2d at 1035-36; **see also Morning Star**, 2015 WL 2408477, at *5; **United Van Lines**, 2006 WL 5003366, at *3; and, second, that such a rule is justified by the narrow construction that the Supreme Court has instructed courts to give the § 1 exemption, see **United Van Lines**, 2006 WL 5003366, at *3.

Prime urges us to add our voice to this "judicial chorus," but we are unwilling to do so. Interpreting a federal statute is not simply a numbers game. See **In re Atlas IT Exp. Corp.**, 761 F.3d at 182-83 ("The numbers favoring a rule do not necessarily mean that the rule is the best one. Indeed, there is an observable phenomenon in our courts of appeal and elsewhere — sometimes called 'herding' or 'cascading' — where decisionmakers who first encounter a particular issue (i.e., the first court to consider a question) are more likely to rely on the record presented to them and their own reasoning, while later courts are increasingly more likely to simply go along with the developing group consensus."). Instead of simply tallying the score, "it is always incumbent on us to decide afresh any issue of first impression in our circuit." Id. at 183. After conducting that fresh look in this case, we are distinctly unpersuaded by the district courts' treatment of this issue.

The fatal flaw in the district-court authority on which Prime relies is a failure to closely examine the statutory text — the critical first step in any statutory-interpretation inquiry. See **Maldonado-Burgos**,

844 F.3d at 340. Because Congress did not provide a definition for the phrase "contracts of employment" in the FAA, we "give it its ordinary meaning." United States v. Stefanik, 674 F.3d 71, 77 (1st Cir. 2012) (quoting United States v. Santos, 553 U.S. 507, 511 (2008)). And we discern the ordinary meaning of the phrase at the time Congress enacted the FAA in 1925. See Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Therefore, we look to the ordinary meaning of the term . . . at the time Congress enacted the statute . . . ." (citation omitted)); see also Sandifer v. U.S. Steel Corp., 134 S. Ct. 870, 876 (2014) (consulting "[d]ictionaries from the era of [statutory provision's] enactment" to espy ordinary meaning of undefined term); Carcieri v. Salazar, 555 U.S. 379, 388 (2009) ("We begin with the ordinary meaning of the word 'now,' as understood when the [statute] was enacted.").[18] We now turn to that task.

---

[18] At oral argument, Prime insisted that the Supreme Court in Circuit City rejected this approach for discerning the plain meaning of the FAA's text. But the Court did no such thing. In that case, the Court was confronted with an argument that, "because the FAA was enacted when congressional authority to regulate under the commerce power was to a large extent confined by [Supreme Court] decisions," the phrase "engaged in commerce" in § 1 should be interpreted as "expressing the outer limits of Congress'[s] power as then understood." Circuit City, 532 U.S. at 116. The Court rejected this argument, which it characterized as "[a] variable standard" depending on "shifts in the Court's Commerce Clause cases" that would require courts to "take into account the scope of the Commerce Clause, as then elaborated by the Court, at the date of the FAA's enactment in order to interpret what the

1. Ordinary Meaning of Statutory Text

Oliveira argues that the phrase "contracts of employment" contained in § 1 means simply "agreements to do work." We agree. This interpretation is consistent with the ordinary meaning of the phrase at the time Congress enacted the FAA.

Dictionaries from the era of the FAA's enactment confirm that the ordinary meaning of "contracts of employment" in 1925 was agreements to perform work. See **Webster's New International Dictionary of the English Language** 488 (W.T. Harris & F. Sturges Allen eds., 1923) (defining "contract" when used as noun as "[a]n agreement between two or more persons to do or forbear something"); id. at 718 (defining "employment" as "[a]ct of employing, or state of being employed" and listing "work" as synonym for "employment"); id. (defining "employ" as "[t]o make use of the services of; to have or keep at work; to give employment to"); see also **Webster's Collegiate Dictionary**

---

statute means now." Id. at 116-17. The Court reasoned that "[i]t would be unwieldy for Congress, for the Court, and for litigants to be required to deconstruct statutory Commerce Clause phrases depending upon the year of a particular statutory enactment." Id. at 118. In this case, by contrast, our attempt to discern the ordinary meaning of the phrase "contracts of employment" does not require us to sort through paradigm shifts in Supreme Court precedent but simply to apply the "fundamental canon of statutory construction" that undefined statutory terms should be given their ordinary meaning at the time of the statute's enactment, Sandifer, 134 S. Ct. at 876 (quoting Perrin, 444 U.S. at 42) — a canon that has been applied in FAA cases since Circuit City. See, e.g., Conrad v. Phone Directories Co., 585 F.3d 1376, 1381-82 & n.1 (10th Cir. 2009) (in interpreting undefined term in § 16 of FAA, consulting dictionary from era of § 16's enactment).

329 (3d ed. 1925) (providing similar definition of "employment" and similarly listing "work" as synonym for "employment"); id. (defining "employ" as "[t]o make use of; use" and "[t]o give employment or work to" and explaining "[e]mploy is specifically used to emphasize the idea of service to be rendered"). In other words, these contemporary dictionaries do not suggest that "contracts of employment" distinguishes employees from independent contractors.[19]

---

[19] Although not referenced by either party, we note that the current edition of **Black's Law Dictionary** indicates that the earliest known use of the phrase "employment contract" was 1927 — two years after the FAA's enactment. See *Employment Contract*, **Black's Law Dictionary** (10th ed. 2014); id. at xxxi (explaining that "[t]he parenthetical dates preceding many of the definitions show the earliest known use of the word or phrase in English"). The current edition also indicates that "contract of employment" is a synonym for "employment contract," and it defines "employment contract" in a manner that arguably excludes independent contractors: "[a] contract between an employer and employee in which the terms and conditions of employment are stated." *Employment Contract*, **Black's Law Dictionary** (10th ed. 2014). It is unclear whether the unknown source from 1927 provided the basis for the current definition of "employment contract" or, instead, whether that source has merely been identified as the first known use of the phrase. We need not, however, dwell on this point because, as explained below, several sources from the era of the FAA's enactment use the phrase "contract of employment" to refer to independent contractors. Additionally, we note that the two editions of **Black's Law Dictionary** that bookend the FAA's enactment, see Black's Law Dictionary (3d ed. 1933); **Black's Law Dictionary** (2d ed. 1910), provide no definition for the phrases "contract of employment" or "employment contract."

Additionally, this ordinary meaning of "contracts of employment" is further supported by other authorities from the era of the FAA's enactment, which suggest that the phrase can encompass agreements of independent contractors to perform work. See, e.g., Annotation, Teamster as Independent Contractor Under Workmen's Compensation Acts, 42 A.L.R. 607, 617 (1926) ("When the contract of employment is such that the teamster is bound to discharge the work himself, the employment is usually one of service, whereas, if, under the contract, the teamster is not obligated to discharge the work personally, but may employ others to that end and respond to the employer only for the faithful performance of the contract, the employment is generally an independent one." (emphasis added)); Theophilus J. Moll, A Treatise on the Law of Independent Contractors & Employers' Liability 47-48 (1910) ("It has been laid down that the relation of master and servant will not be inferred in a case where it appears that the power of discharge was not an incident of the contract of employment." (emphasis added)); id. at 334 ("The [independent] contractor . . . is especially liable for his own acts when he assumes this liability in his contract of employment." (emphasis added)).[20]

---

[20] See also Luckie v. Diamond Coal Co., 183 P. 178, 182 (Cal. Dist. Ct. App. 1919) ("We think that the nature of Foulk's relation to defendant at the time of the accident, whether that of an independent contractor or servant, must be determined not alone from the terms of the written contract of employment, but from the subsequent conduct of each, known to and acquiesced in by the other." (emphasis added)); Hamill v. Territilli, 195 Ill. App. 174, 175 (1915) ("[T]he only question in the case was whether or not, under the contract of employment, the relationship existing

---

between Territilli and Scully and the appellant was that of independent contractor or that of master and servant . . . ." (emphasis added)); Eckert's Case, 124 N.E. 421, 421 (Mass. 1919) ("It was provided by his contract of employment that he should furnish the team, feed, take care of and drive the horses for a fixed daily remuneration. The entire management and mode of transportation were under his control . . . . It is plain as matter of law . . . that when injured he was not an employé of the town but an independent contractor." (emphasis added) (citations omitted)); Lindsay v. McCaslin, 122 A. 412, 413 (Me. 1923) ("When the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court as a matter of law." (emphasis added)); Allen v. Bear Creek Coal Co., 115 P. 673, 679 (Mont. 1911) ("The relation of the parties under a contract of employment is determined by an answer to the question, Does the employé in doing the work submit himself to the direction of the employer, both as to the details of it and the means by which it is accomplished? If he does, he is a servant, and not an independent contractor. If, on the other hand, the employé has contracted to do a piece of work, furnishing his own means and executing it according to his own ideas, in pursuance of a plan previously given him by the employer, without being subject to the orders of the latter as to detail, he is an independent contractor." (emphasis added)); Tankersley v. Webster, 243 P. 745, 747 (Okla. 1925) ("[T]he contract of employment between Tankersley and Casey was admitted in evidence without objections, and we think conclusively shows that Casey was an independent contractor." (emphasis added)); Kelley v. Del., L. & W. R. Co., 113 A. 419, 419 (Pa. 1921) ("The question for determination is whether deceased was an employee of defendant or an independent contractor . . . . To decide, it is necessary to construe the written contract of employment . . . ." (emphasis added)); U.S. Fid. & Guar. Co. of Baltimore, Md. v. Lowry, 231 S.W. 818, 822 (Tex. Civ. App. 1921) (stating that, in determining whether person "was an employé and not an independent contractor," "'[n]o single fact is more conclusive as to the effect of the contract of employment, perhaps, than the unrestricted right of the employer to end the particular service whenever he chooses, without regard to the final result of

Prime seeks to downplay the significance of these other authorities, noting that they do not deal with the FAA. True enough, but the phrase "contracts of employment" must have some meaning, and Prime does not attempt to explain how its proposed interpretation is consistent with the ordinary meaning of the words used in the statute. And the lack of a textual anchor is not the only flaw in Prime's interpretation. In **Circuit City**, the Supreme Court noted "Congress'[s] demonstrated concern with transportation workers and their necessary role in the free flow of goods" at the time when it enacted the FAA. 532 U.S. at 121. Given that concern, the distinction that Prime advocates based on the precise employment status of the transportation worker would have been a strange one for Congress to draw: Both individuals who are independent contractors performing transportation

---

the work itself" (emphasis added) (quoting Cockran v. Rice, 128 N.W. 583, 585 (S.D. 1910))); Annotation, General Discussion of the Nature of the Relationship of Employer and Independent Contractor, 19 A.L.R. 226, 250 (1922) (discussing "the question whether a contract of employment is one of an independent quality").

Along similar lines, legal dictionaries from the era of the FAA's enactment used the term "employment" as part of the definition of "independent contractor." See, e.g., *Independent Contractor*, Ballentine's Law Dictionary (1930) (defining independent contractor as "[o]ne who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work"); *Independent Contractor*, Black's Law Dictionary (3d ed. 1933) (same); *Independent Contractor*, Black's Law Dictionary (2d ed. 1910) (same); 2 Francis Rawle, Bouvier's **Law Dictionary & Concise Encyclopedia** 1533 (3d rev. 1914) (same).

work and employees performing that same work play the same necessary role in the free flow of goods.

In sum, the combination of the ordinary meaning of the phrase "contracts of employment" and Prime's concession that Oliveira is a transportation worker compels the conclusion that the contract in this case is excluded from the FAA's reach. Because the contract is an agreement to perform work of a transportation worker, it is exempt from the FAA. We therefore decline to follow the lead of those courts that have simply assumed that contracts that establish or purport to establish independent-contractor relationships are not "contracts of employment" within the meaning of § 1.

2. Narrow Construction and Policy Favoring Arbitration

We also are unpersuaded by the two justifications that some district-court decisions put forward to support the conclusion that the § 1 exemption does not apply to contracts that establish or purport to establish independent-contractor relationships — that such an interpretation is consistent with the need to narrowly construe § 1 and the liberal federal policy favoring arbitration. In our view, neither consideration warrants retreat from the ordinary meaning of the statutory text.

To be sure, the Supreme Court has cautioned that the § 1 exemption must "be afforded a narrow construction." Circuit City, 532 U.S. at 118. Prime seizes on this pronouncement and insists that it forecloses our conclusion that the § 1 exemption applies to trans-

portation-worker agreements that establish or purport to establish independent-contractor relationships. We disagree.

In Circuit City, the contract at issue was between Circuit City, a national retailer of consumer electronics, and Adams, a store sales counselor. 532 U.S. at 109-10. The Ninth Circuit had interpreted the § 1 exemption to exclude all contracts of employment from the FAA's reach. Id. at 112. In defense of this interpretation, Adams argued that the phrase "engaged in . . . commerce" in § 1 exempted from the FAA all employment contracts falling within Congress's commerce power. Id. at 114. The Supreme Court rejected this broad interpretation in favor of a narrower one that was compelled by the text and structure of § 1: "Section 1 exempts from the FAA only contracts of employment of transportation workers." Id. at 119; see id. at 114-15. Because the phrase "any other class of workers engaged in . . . commerce" appeared in the residual clause of § 1, id. at 114, the Court reasoned that "the residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it," id. at 115.

This context is critical. The Court announced the need for a narrow construction of the § 1 exemption in the course of "rejecting the contention that the meaning of the phrase 'engaged in commerce' in § 1 of the FAA should be given a **broader construction than justified by its evident language**." Id. at 118 (emphasis added). As the Court explained, this broader construction was doomed by the text itself; "the text of the FAA foreclose[d] the [broader] construction of § 1," id. at

119, and "undermine[d] any attempt to give the provision a sweeping, open- ended construction," id. at 118. The Court's narrower interpretation, by contrast, was based on "the precise reading" of that provision. Id. at 119.

It is one thing to say that statutory text compels adoption of a narrow construction over "an expansive construction . . . that goes beyond the meaning of the words Congress used." Id. Prime's argument is very different: It snatches up Circuit City's narrow-construction pronouncement, wholly ignores the context in which that pronouncement was made, and attempts to use it as an escape hatch to avoid the plain meaning of the § 1 exemption's text. But nothing in Circuit City suggests that the need for a narrow construction can override the plain meaning of the statutory language in this fashion, and we reject Prime's attempt to artificially restrict the plain meaning of the text.

Moreover, Oliveira is nothing like the sales counselor in Circuit City. Instead, the truck-driving work that he performs directly impacts "the free flow of goods." Id. at 121. Therefore, Circuit City's adoption of a narrow construction to cover only transportation workers and not sales counselors is no basis for this court to accept a constricted interpretation of the phrase "contracts of employment" that is inconsistent with both the ordinary meaning of the language used in § 1 and "Congress's demonstrated concern with transportation workers and their necessary role in the free flow of goods." Id. For these reasons, we do not view Circuit City or the narrow-construction principle as supporting Prime's interpretation that the § 1 exemption does not extend to independent contractors.

We are similarly unpersuaded by invocation of the federal policy in favor of arbitration. That policy cannot override the plain text of a statute. See EEOC v. Waffle House, Inc., 534 U.S. 279, 295 (2002) (rejecting notion that "the federal policy favoring arbitration trumps the plain language of Title VII and the contract"); cf. id. at 294 (explaining that, "[w]hile ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated" and concluding that "the proarbitration policy goals of the FAA do not require the [EEOC] to relinquish its statutory authority if it has not agreed to do so" (citation omitted)); Paul Revere, 226 F.3d at 25 (rejecting "attempts to invoke the federal policy favoring arbitration" because "[t]hat policy simply cannot be used to paper over a deficiency in Article III standing"); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 116 n.13 (1996) (Souter, J., dissenting) ("[P]lain text is the Man of Steel in a confrontation with background principle[s] and postulates which limit and control." (internal citation and quotation marks omitted)). As we have explained, a careful examination of the ordinary meaning of the phrase "contracts of employment" — an effort eschewed by the district-court authority cited by Prime — supports our conclusion that the phrase means agreements to perform work and includes independent-contractor agreements. The federal policy favoring arbitration cannot erase this plain meaning.

3. Final Words

For these reasons, we hold that a transportation-worker agreement that establishes or purports to establish an independent-contractor relationship is a contract of employment under § 1. We emphasize that our holding is limited: It applies only when arbitration is sought under the FAA, and it has no impact on other avenues (such as state law) by which a party may compel arbitration.[21]

---

[21] Prime insists that, even if the district court is powerless to compel arbitration under the FAA because the § 1 exemption applies, it still can request the district court to "compel arbitration on other grounds, such as state law, or use other tools at its disposal to enforce the parties' explicit agreement to arbitrate — such as dismissing or staying the case." For his part, Oliveira appears to suggest that this ship has sailed because Prime's motion to compel was based solely on the FAA. Prime counters that, to the extent Oliveira is under the impression that Prime has waived the right to compel arbitration on grounds other than the FAA, he is mistaken because no prejudice has been shown. We do not wade into this dispute. The fleeting references in both parties' briefs are hardly the stuff of developed argumentation, and this waiver issue was not addressed by the district court. If the parties desire to continue this fight in the district court, they are free to do so.

Along similar lines, although Prime argues in its opening brief that the arbitration provision covers disputes between the parties that arose before and after the time period in which the contract was in effect, it takes a different tack in its reply brief, imploring us to refrain from deciding this issue because the district court did not definitively rule on it below. We accept Prime's invitation and leave the issue for the district court to address in the first instance.

Conclusion

To recap, we hold that, when confronted with a motion to compel arbitration under § 4 of the FAA, the district court, and not the arbitrator, must decide whether the § 1 exemption applies. Additionally, we hold that transportation-worker agreements that establish or purport to establish independent-contractor relationships are "contracts of employment" within the meaning of the § 1 exemption.[22] Because the contract in this case is within the § 1 exemption, the FAA does not apply, and we consequently lack jurisdiction under 9 U.S.C. § 16(a)(1)(B) — the only conceivable basis for our jurisdiction over this interlocutory appeal. See Int'l Bhd. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 957-58 (7th Cir. 2012). Accordingly, we affirm the district court's denial of Prime's motion to compel arbitration, and dismiss the appeal for lack of appellate jurisdiction.

-Concurring and Dissenting Opinion Follows-

BARBADORO, District Judge, concurring in part and dissenting in part. I agree with the majority that the applicability of the § 1 exemption is a threshold matter for the district court to decide. Where we part company is at the point where the majority decides to take on the difficult issue as to whether transportation-worker agreements that purport to create independent-contractor relationships are exempt from the Federal Arbitration Act. That, in my view, is an issue we need not decide now. Instead,

---

[22] In light of this conclusion, we need not address the parties' arguments about the necessity and permissibility of discovery in the event that the § 1 exemption does not apply to independent-contractor agreements.

if it ultimately proves necessary to determine whether the § 1 exemption covers all such independent-contractor agreements, the district court should do so in the first instance with the benefit of more in-depth briefing and a fully developed factual record.

The scope of the § 1 exemption comes before us on what amounts to an interlocutory appeal. See Omni Tech Corp. v. MPC Sols. Sales, LLC, 432 F.3d 797, 800 (7th Cir. 2005). The district court did not reach any final judgment as to the exemption, instead dismissing New Prime's motion to compel arbitration without prejudice and allowing for discovery on Oliveira's employment status. Oliveira v. New Prime, Inc., 141 F. Supp. 3d 125, 135 (D. Mass. 2015). As there has been no final judgment in the district court, I hesitate to resolve an issue that is not necessary to the disposition of this appeal. See Doe v. Cape Elizabeth Sch. Dist., 832 F.3d 69, 86 (1st Cir. 2016) (declining to address unnecessary issue and deeming it prudent to allow district court to make determination in the first instance). And it is indeed unnecessary to determine the scope of the exemption at this time. If the case were remanded to the district court for discovery, the court might well rule that the nominally independent-contractor agreements between Oliveira and New Prime actually created an employer-employee relationship. In that circumstance, neither we nor the district court would have any occasion to categorically decide whether all transportation-worker agreements purporting to create independent-contractor relationships qualify for the § 1 exemption.

I am particularly reluctant to unnecessarily resolve an issue on an interlocutory appeal when, as is

the case here, a number of factors counsel against doing so. Most fundamentally, deciding whether "contracts of employment" includes all transportation-worker agreements presents a challenging question of statutory interpretation. The statute itself provides little guidance. Further, as the majority notes, most courts that have considered independent-contractor agreements in the § 1 context have concluded that the exemption does not apply, and no other court has engaged in the kind of detailed analysis of ordinary meaning that characterizes the majority's opinion. We therefore have neither an example to guide and corroborate our analysis nor a contrary opinion to provide counterbalance.

Moreover, applying § 1 in this case requires venturing into the fact-bound, and notoriously precarious, field of employment-status determinations. Although the majority's categorical rule would eliminate the need for fact-finding on status, it could also lead to the over- and under-inclusiveness concerns typical of such rules. As Justice Rutledge observed in NLRB v. Hearst Publications, 322 U.S. 111 (1944): "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing." Id. at 121 (subsequent history omitted). The doctrinal line separating employee from independent contractor is difficult to discern in the context of vicarious liability. See id. "It becomes more [difficult] when the field is expanded to include all of the possible applications of the distinction." Id. We find ourselves confronted by one of those "possible applications," making the issue before us all

the more challenging. See Mandel v. Boston Phoenix, Inc., 456 F.3d 198, 206–07 (1st Cir. 2006) (vacating and remanding summary judgment order where, inter alia, there was little on-point federal or state case law and pertinent determination was fact-intensive).

Not only do we face a hard question — given that the contemporary meaning of § 1's language may differ from its meaning when adopted — but we do so without the aid of a well-developed district court record. Before the district court, the parties provided little briefing on the ordinary meaning of "contracts of employment" as of 1925. Oliveira initially argued that he was an employee of New Prime. He first briefed an ordinary-meaning argument in a short supplemental surreply submitted to the district court after a hearing on the motion to compel arbitration. Oliveira cited just two sources from the time of adoption. In a subsequent supplemental surreply, New Prime declined to address the ordinary-meaning issue head-on, instead only reiterating that the matter was for the arbitrator. The district court's order reflects this dearth of briefing. Rather than directly addressing the less-than-robust argument Oliveira raised in his supplemental brief, the court noted the extensive contrary case law and permitted discovery to resolve the case. See Oliveira, 141 F. Supp. 3d at 130–31, 135. When the ordinary-meaning issue reached this court, the record accordingly provided little guidance. See United States v. Clark, 445 U.S. 23, 38 (1980) (Rehnquist, J., dissenting) (recognizing usefulness of lower court opinions); Cape Elizabeth Sch. Dist., 832 F.3d at 84–85 (choosing not to decide unnecessary question where parties gave "scant attention" to issue in lower court).

The briefing before this court was also less than ideal. Although Oliveira devoted significant effort to arguing that the ordinary meaning of "contracts of employment" in 1925 included contracts with independent contractors, New Prime barely addressed the matter. It did not mention the ordinary-meaning argument in its opening brief, and spent only a page on the topic in its reply brief. At oral argument, New Prime merely insisted that ordinary-meaning analysis is inappropriate in the § 1 context. Where a court has the discretion to decide an issue, it should be wary of acting without the benefit of fully developed arguments on both sides. That is especially the case when we rule against the party with the less-developed argument.

Just as we have been presented with a one-sided view of the ordinary meaning of "contracts of employment," we have received a one-sided view of the facts. This appeal was taken early in the litigation between the parties, prior to any discovery that would have shed greater light on the facts underlying the dispute. The current factual record contains only Oliveira's unanswered complaint and some documents attached to the parties' motions. While the court is entitled to base its analysis on allegations in the complaint, Gove v. Career Sys. Dev. Corp., 689 F.3d 1, 2 (1st Cir. 2012), we should exercise added caution in denying affirmative relief to a defendant when our view of the facts is informed largely by the plaintiff's untested allegations.

Under these circumstances, our best option is to remand the § 1 exemption question to the district court so that discovery may proceed and the court may reach a final decision. If either party were to appeal

any subsequent final decision of the district court, we would have the benefit of a better-developed factual record, more-focused briefing from both parties, and additional district court analysis. See Denmark v. Liberty Life Assur. Co. of Boston, 566 F.3d 1, 12 (1st Cir. 2009) (Lipez, J., concurring) (expressing concern over dicta in majority opinion "fashioned without the benefit of district court analysis or briefing by the parties").

The majority has done an impressive job of marshalling the arguments in support of its interpretation of § 1. I dissent not to take issue with the court's reasoning but merely to express my view that we would be better served in following a more cautious path.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the First Circuit

DOMINIC OLIVEIRA, on his behalf and on behalf of all others similarly situated Plaintiff-Appellee, v. NEW PRIME, INC. Defendant-Appellant.	No. 15-2364

Before

Howard, Chief Judge,
Torruella, Lynch, Thompson,
Kayatta and Barron, Circuit Judges,
and Barbadoro,* District Judge.

* Of the District of New Hampshire, sitting by designation.

ORDER OF COURT

Entered: June 27, 2017

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Richard H. Frankel
Hillary A. Schwab
Brant Casavant
Andrew Arthur Schmidt
Jennifer Bennett
William E. Quirk
Robert John Hingula
Judith A. Leggett
James C. Sullivan
Jason C. Schwartz
Joshua S. Lipshutz
Theodore J. Boutrous Jr.
Richard Pianka
Andrew J. Pincus
Warren David Postman
Archis Ashok Parasharami
Daniel Edward Jones
Kate Comerford Todd

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOMINIC OLIVEIRA, Plaintiff v. NEW PRIME, INC., Defendant.	Civil Action No. 15-10603-PBS

MEMORANDUM AND ORDER

October 26, 2015

Saris, C.J.

INTRODUCTION

This case involves a labor dispute between a trucking corporation and a former truck driver. In March 2015, the plaintiff Dominic Oliveira brought this proposed class action alleging that the defendant New Prime, Inc. violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq., and Missouri and Maine labor laws, by failing to pay its truck drivers minimum wage (Docket Nos. 1, 33). New Prime moved to compel arbitration under § 4 of the Federal Arbitra-

tion Act (FAA), 9 U.S.C. § 4, and two operating agreements signed by Oliveira on behalf of Hallmark Trucking LLC, both of which contain an arbitration clause (Docket No. 35). Oliveira argues that the Court must determine whether the operating agreements are exempt from arbitration under § 1 of the FAA before it can consider New Prime's motion to compel arbitration (Docket No. 40). New Prime maintains that the exemption's application is a threshold question of arbitrability that the parties delegated to the arbitrator in the operating agreements (Docket No. 51). After hearing, I agree that it is for the Court, and not the arbitrator, to decide whether the § 1 exemption applies before considering the motion. The motion to compel arbitration is therefore **DENIED** without prejudice.[1]

FACTUAL BACKGROUND

The following facts are taken from the First Amended Complaint (Docket No. 33) and the operating agreements referenced by all parties (Docket No. 36, Ex. A, Ex. B). In March 2013, Plaintiff Dominic Oliveira entered Defendant New Prime's "Paid Apprenticeship" training program, which is advertised as an on-the-job training program for new truck driv-

---

[1] Alternatively, New Prime argues that the Court should dismiss the case for improper venue because the arbitration clause states that arbitration is to take place in Missouri. If the case remains in this Court and moves forward, New Prime moves to dismiss Oliveira's breach of contract/unjust enrichment claim (Count 3), arguing that it is preempted by the FLSA and the Federal Aviation Administration Authorization Act. The Court will not address these issues until the threshold issue of exemption is resolved.

ers. Docket No. 33, Ex. 2, Ex. 3. Apprentices first obtain a Missouri Commercial Driver's License (CDL) permit. They next shadow New Prime drivers for three to four weeks and drive 10,000 miles under supervision. During this time, apprentices receive an advance of $200 per week, which is subtracted from their future earnings, but otherwise receive no remuneration. As a result, apprentices are essentially free labor while they train with New Prime. Under Department of Transportation regulations, trucks can be on the road for longer periods of time when a New Prime driver switches off with an apprentice.

After completion of this on-the-road instruction, apprentices take a CDL exam and then work as a "B2" company driver trainee for 30,000 miles. During this period, the trainees earn fourteen cents per mile driven, but are not paid for time spent loading and unloading cargo or protecting company property. The company also regularly deducts money from paychecks, including the $200 weekly advance from the apprenticeship program. As a result of these deductions, Oliveira received approximately $440-$480 per week for driving 5,000-6,000 miles, which equates to about $4/hour while driving.

Finally, after completing the 30,000 miles as a B2 company driver trainee, the truck drivers complete additional orientation classes, which last for about a week. They are then classified as either company drivers or independent contractors. The truck drivers are not paid for the time spent in the orientation classes, and receive a $100 bonus if they opt to become independent contractors.

In May 2013, when Oliveira returned from his trainee driving, New Prime told Oliveira that he could make more money if he became an independent contractor. New Prime directed him to a company called Abacus Accounting, which was located on the second floor of New Prime's building. Abacus Accounting told Oliveira to provide suggested names for a limited liability company (LLC), and then created Hallmark Trucking LLC on his behalf. New Prime also directed Oliveira to Success Leasing, a closely related corporation to New Prime, to select a truck.

At Success Leasing, Oliveira was given several documents to sign. One of these documents was titled "INDEPENDENT CONTRACTOR OPERATING AGREEMENT," which repeatedly states that the intent of the agreement is to establish an independent contractor relationship between New Prime and Hallmark Trucking LLC. Docket No. 36, Ex. A, at 1, 9. The agreement also contains the following arbitration clause:

> GOVERNING LAW AND ARBITRATION. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF MISSOURI. ANY DISPUTES ARISING UNDER, ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING AN ALLEGATION OF BREACH THEREOF, AND ANY DISPUTES ARISING OUT OF OR RELATING TO THE RELATIONSHIP CREATED BY THE AGREEMENT, AND ANY DISPUTES AS TO THE RIGHTS AND OBLIGATIONS OF THE PARTIES, INCLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION IN ACCORDANCE WITH MISSOURI'S

> ARBITRATION ACT AND/OR THE FEDERAL ARBITRATION ACT . . . THE PARTIES SPECIFICALLY AGREE THAT NO DISPUTE MAY BE JOINED WITH THE DISPUTE OF ANOTHER AND AGREE THAT CLASS ACTIONS UNDER THIS ARBITRATION PROVISION ARE PROHIBITED . . . THE PLACE OF THE ARBITRATION HEREIN SHALL BE SPRINGFIELD, MISSOURI.

Id. at 10. Oliveira "felt pressure" to sign quickly because New Prime had a load waiting for him outside. Docket No. 33, ¶ 45. Success Leasing then instructed Oliveira to go to the New Prime company store to purchase security locks, fuel, insurance, and other tools of the trade. These items totaled roughly $5,000, which New Prime then deducted from his paycheck at a rate of $75 per week.

Although New Prime labeled Oliveira an independent contractor in the operating agreement, his role as a truck driver for New Prime did not change from his time as an apprentice and trainee driver. New Prime continued to directly and indirectly control Oliveira's scheduling, vacations, and time at home by requiring him to take specific training courses and follow certain procedures. These courses and procedures limited which shipments he could take and made it difficult, if not impossible, for him to work for other trucking or shipping companies. In particular, New Prime dispatched drivers through a "QUALCOMM system" that was not adaptable to other carriers. Docket No. 33, ¶ 51.[2]

---

[2] The parties have not explained what the "QUALCOMM SYSTEM" is or how it works.

Meanwhile, New Prime continued to make regular deductions from Oliveira's paycheck, ostensibly because of lease payments on the truck and payments for the other tools that New Prime instructed him to buy. On several occasions, his weekly pay was negative after spending dozens of hours on the road. In March 2014, Oliveira signed a second contract titled "INDEPENDENT CONTRACTOR OPERATING AGREEMENT" on behalf of Hallmark Trucking LLC, which contains an identical arbitration clause to that in the first agreement. Docket No. 36, Ex. B, at 1, 9-10. The second contract also repeatedly states that the agreement establishes an independent contractor relationship between New Prime and Hallmark Trucking LLC.

Oliveira terminated his contract with New Prime in September 2014. The next month, however, New Prime rehired him as a company driver on the condition that New Prime would continue deducting money from his paychecks to repay an alleged debt to Success Leasing. With these deductions, Oliveira again was paid below the minimum wage. He now brings this class action, arguing that he and other New Prime drivers were not paid the minimum wage under federal and state law.

DISCUSSION

I. Statutory Framework

Congress enacted the FAA in 1925 in "response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001). To give effect to this purpose, § 2 of the FAA provides

that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; see also Circuit City, 532 U.S. at 111. In short, § 2 "is a congressional declaration of a liberal federal policy favoring arbitration agreements." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991). "At a minimum, this policy requires that ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration." PowerShare, Inc. v. Syntel, Inc., 597 F.3d 10, 15 (1st Cir. 2010) (internal quotation marks and alterations omitted).

The Act provides two mechanisms through which federal courts may enforce § 2's liberal policy favoring arbitration. See Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 68 (2010). Section 3 instructs district courts to stay the trial of an action "upon any issue referable to arbitration under an agreement in writing for such arbitration" once the court is "satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement." 9 U.S.C. § 3. Section 4 allows any party "aggrieved" by the failure of another party "to arbitrate under a written agreement for arbitration" to petition a district court for "an order directing that such arbitration proceed in the manner provided for in such agreement." Id. § 4. The district court "shall" order arbitration upon being satisfied that "the making of the agreement for arbitration or the failure to comply therewith is not in issue." Id.

Despite the FAA's broad purpose and strong language, the Act does not extend to all arbitration agreements. Section 2 limits its application to contracts "evidencing a transaction involving commerce," or arising from a "maritime transaction." 9 U.S.C. § 2. More importantly for purposes of the present dispute, § 1, titled "exceptions to operation of title," states "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Id. § 1. Section 1 thus exempts "contracts of employment of transportation workers" from the FAA entirely. Circuit City, 532 U.S. at 119. Employment contracts involving truck drivers fall within the transportation worker exception. See, e.g., Lenz v. Yellow Transp., Inc., 431 F.3d 348, 351 (8th Cir. 2005) (holding that a truck driver, but not a customer service representative, is a transportation worker under § 1); Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001) (holding that a truck driver was exempt from the FAA under § 1); Am. Postal Workers Union v. United States Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987) (noting that courts have limited the § 1 exemption to "workers actually engaged in interstate commerce, including bus drivers and truck drivers" (internal quotation marks omitted)).

The FAA does not define the term "contract of employment." See 9 U.S.C. § 1. Although neither the Supreme Court nor the First Circuit has directly addressed the issue, courts generally agree that the § 1 exemption does not extend to independent contractors. See, e.g., Carney v. JNJ Express, Inc., 10 F. Supp. 3d 848, 852-53 (W.D. Tenn. 2014) ("If the [plain-

tiffs] are independent contractors, their claims are arbitrable under the FAA."); Villalpando v. Transguard Ins. Co. of Am., 17 F. Supp. 3d 969, 982 (N.D. Cal. 2014) (same); Port Drivers Fed'n 18, Inc. v. All Saints, 757 F. Supp. 2d 463, 472 (D.N.J. 2011) (same); Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co., 288 F. Supp. 2d 1033, 1035-36 (D. Ariz. 2003) (same). This construction comports well with "the FAA's purpose of overcoming judicial hostility to arbitration," and the Supreme Court's instruction "that the § 1 exclusion provision be afforded a narrow construction" in light of that purpose. Circuit City, 532 U.S. at 118 (holding that § 1 only exempts employment contracts of transportation workers from the FAA's reach, not all employment contracts).[3]

II. Analysis

Oliveira's relationship with New Prime can be divided into three periods of time: (1) March 2013 to May 2013, when Oliveira worked for New Prime through the apprenticeship program and as a B2 company driver trainee; (2) May 2013 to September 2014, when Oliveira worked for New Prime under the two operating agreements; and (3) post-October 2014, when New Prime rehired Oliveira as a company driver.[4] Under the statutory framework discussed above, the FAA's application to the present case hinges on whether Oliveira had a contract of employment or an independent contractor relationship with New Prime—and thus falls within or outside the § 1

---

[3] The parties do not dispute that Oliveira was a transportation worker under § 1.

[4] The parties do not specify when Oliveira's relationship with New Prime ended permanently.

transportation worker exemption— during each of these three time periods. New Prime appears to concede that Oliveira was an employee in the first and third time periods, and instead argues that the arbitration clause in the operating agreements should extend retroactively and prospectively to cover these intervals.

More specifically, New Prime maintains that Oliveira's claims from his time as an "employee driver" before signing the operating agreements, and after he was rehired as a company driver, fall within the scope of the arbitration clause for two reasons. Docket No. 51, at 7. First, Oliveira's "allegations related to his time as an employee are inextricably related to his decision to become an independent contractor and enter into the Agreements." Id. Next, New Prime contends that the arbitration clause "is very broad and clearly applies to 'any disputes as to the rights and obligations of the parties.'" Id. (quoting Docket No. 36, Ex. A, at 10, Ex. B, at 9-10). New Prime cites to **Kristian v. Comcast Corp.**, 446 F.3d 25, 33-35 (1st Cir. 2006) for the proposition that an arbitration agreement can be applied retroactively if broadly phrased to include claims or disputes that arose prior to signing the agreement.[5]

At this stage in the proceeding, these arguments fail, because they do not address the applicability of the § 1 transportation worker exemption. If Oliveira was an employee in the first and third time periods,

---

[5] New Prime does not cite, and the Court is not aware of, any cases in which a court applied an arbitration agreement to claims arising after termination of the contract containing the arbitration clause.

then the § 1 exemption applies and the Court cannot order the parties to arbitrate any claims that arose before Oliveira signed the operating agreements or after New Prime rehired Oliveira as a company driver in October 2014. That said, the parties dispute whether Oliveira was an employee or independent contractor during at least the second time period, and whether it is for the Court or the arbitrator to decide the threshold question of the FAA's applicability.

A. Gateway Questions of Arbitrability

The Supreme Court has repeatedly emphasized that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942-43 (1995); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). Parties can agree to allow arbitrators decide "gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." Rent-A-Center, 561 U.S. at 68-69 (internal quotation marks and alterations omitted). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." Id. at 69. An agreement granting the arbitrator authority to decide threshold questions of arbitrability is generally referred to as a "delegation provision." See id. at 68.

Questions of arbitrability, however, are an exception to the federal policy favoring arbitration agreements. Howsam, 537 U.S. at 83; **Kristian**, 446 F.3d at 37-38. "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." First Options, 514 U.S. at 944 (internal quotation marks and alterations omitted); **see also** Howsam, 537 U.S. at 83 ("The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, *the question of arbitrability*, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." (internal quotation marks and alterations omitted)). In short, courts must enforce valid delegation provisions under the FAA, but courts scrutinize delegation clauses more closely to ensure the parties manifested a clear intent to delegate questions of arbitrability to the arbitrator.

Here, the parties do not contest that the two operating agreements Oliveira signed on behalf of Hallmark Trucking LLC contain valid delegation provisions. The contracts' arbitration clauses state in relevant part: "ANY DISPUTES AS TO THE RIGHTS AND OBLIGATIONS OF THE PARTIES, INCLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION . . ." Docket No. 36, Ex. A, at 10, Ex. B, at 9-10 (emphasis added). Furthermore, as New Prime emphasizes, the arbitration clauses also incorporate the Commercial Arbitration Rules of the American Arbitration Association (AAA). Id. Ex. A, at 10, Ex. B, at 9-10 ("ANY ARBITRATION BETWEEN THE PARTIES WILL BE GOVERNED BY THE COMMERCIAL ABRITRATION RULES OF

THE AMERICAN ARBITRATION ASSOCIATION."). The Rules provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Am. Arbitration Ass'n Commercial Arbitration R. & Mediation P. R-7(a). Thus, the parties have agreed to arbitrate gateway questions of arbitrability.

Oliveira argues that the arbitration clauses, including the delegation provisions, should not be enforced because the operating agreements are substantively and procedurally unconscionable. This argument fails, however, because Oliveira seeks to invalidate the contracts as a whole rather than the delegation provisions, or even the arbitration clauses, specifically. See Rent-A-Center, 561 U.S. at 72 ("Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator."); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) ("[A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.").

B. Applicability of the Transportation Worker Exemption

The delegation provisions and the AAA Rules do not resolve this matter, because they cannot, and do not, address whether the applicability of the § 1 transportation worker exemption is a question of arbitrability that parties can legally delegate to an arbitral forum in the first place. New Prime argues that the

exemption's application is merely a gateway question of arbitrability that the parties delegated to the arbitrator. Oliveira maintains that "questions regarding statutory exemptions to arbitration agreements" under the FAA, including the § 1 exemption, are not questions of arbitrability at all, but a threshold matter that courts must resolve before considering a motion to compel. Docket No. 40, at 3.

Neither the First Circuit nor Supreme Court has answered the central question in this case: does a district court have to determine the applicability of the FAA § 1 exemption itself, or is the exemption issue just another gateway question of arbitrability that contracting parties may validly delegate to an arbitrator? The Ninth Circuit has held that the "district court must make an antecedent determination that a contract is arbitrable under Section 1 of the FAA before ordering arbitration pursuant to Section 4." In re Van Dusen, 654 F.3d 838, 843 (9th Cir. 2011). Meanwhile, the Eighth Circuit has adopted the opposite viewpoint: it characterizes the applicability of the § 1 exemption as a "threshold question of arbitrability" that parties "can agree to have arbitrators decide." Green v. SuperShuttle Int'l, Inc., 653 F.3d 766, 769 (8th Cir. 2011). This Court finds the Ninth Circuit's analysis more persuasive and adopts its approach for the reasons that follow.

In Green v. SuperShuttle International, Inc., current and former airport shuttle bus drivers brought suit against SuperShuttle "alleging violations of the Minnesota Fair Labor Standards Act (MFLSA) arising from SuperShuttle's alleged misclassification of its drivers as franchisees rather than employees." Id.

at 767. The bus drivers had all signed the same franchise agreement that contained both an arbitration clause and a delegation provision. Id. at 768. When SuperShuttle moved to compel arbitration under the agreement and § 4 of the FAA, Green—on behalf of all the drivers—argued that "the district court lacked jurisdiction to compel arbitration because the FAA exempts transportation workers." Id. at 768-69.

The Eight Circuit held that the application of the § 1 transportation worker exemption "is a threshold question of arbitrability in the dispute between Green and SuperShuttle." Id. at 769. The court emphasized that the franchise agreements "specifically incorporated the Rules of the American Arbitration Association (AAA)," which "provide that an arbitrator has the power to determine his or her own jurisdiction over a controversy between the parties." Id. at 769. The court concluded that by incorporating the AAA Rules, "the parties agreed to allow the arbitrator determine threshold questions of arbitrability," and "thus the district court did not err in granting the motion to compel arbitration." Id.

In contrast, when faced with an analogous scenario, the Ninth Circuit analyzed whether the district court must assess the applicability of the § 1 exemption before ordering arbitration in detail. In In re Van Dusen, two interstate truck drivers entered "independent contractor operating agreements" with Swift Transportation Company. 654 F.3d at 840. The agreements contained both an arbitration clause and a delegation provision. Id. at 840-42. Despite these provisions, the plaintiffs filed suit against Swift and Interstate Equipment Leasing, Company in federal district

court alleging violations of the FLSA and of California and New York labor laws. Id.

The In re Van Dusen defendants moved to compel arbitration pursuant to the arbitration clauses in the operating agreements, and the plaintiffs retorted that the contracts were exempt from arbitration under § 1 of the FAA. Id. The district court "declined to rule on the applicability of the exemption, holding that the question of whether an employer/employee relationship existed between the parties was a question for the arbitrator to decide in the first instance." Id. After the district court denied certification for an interlocutory appeal, the plaintiffs sought mandamus relief from the Ninth Circuit. Id.

The Ninth Circuit held[6] that the applicability of the § 1 transportation worker exemption is not a question of arbitrability that the parties may delegate to an arbitrator. Id. at 843-45. The court explained that because a "district court's authority to compel arbitration arises under Section 4 of the FAA," a district court "has no authority to compel arbitration under Section 4 where Section 1 exempts the underlying contract from the FAA's provisions." Id. at 843. "Section 4 has simply no applicability where Section 1 exempts a contract from the FAA, and private parties cannot, through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold." Id. at 844. The court emphasized that "whatever the contracting parties may or may not have agreed upon is a distinct inquiry from whether

---

[6] Actually, the Ninth Circuit denied mandamus because the district court's decision was not clearly erroneous under the stringent standard for a writ of mandamus. Id. at 845-46.

the FAA confers authority on the district court to compel arbitration." Id.

As the Ninth Circuit highlighted, its holding is consistent with the Supreme Court's decision in Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956). See In re Van Dusen, 654 F.3d at 844 (citing Bernhardt, 350 U.S. at 201-02). In Bernhardt, the Supreme Court held that a district court lacked authority to stay litigation pending arbitration under § 3 of the FAA where the underlying contract containing the arbitration agreement did not evidence a "transaction involving commerce" within §§ 1 and 2 of the Act. Bernhardt, 350 U.S. at 201-02. The In re Van Dusen court concluded that this reasoning regarding the relationship between Sections 1, 2, and 3 of the Act "applies with equal force in interpreting the relationship between Sections 1, 2, and 4 of the FAA." In re Van Dusen, 654 F.3d at 844. Based on this analysis, this Court holds that the question of whether the § 1 exemption applies is for the Court, and not the arbitrator, to decide.

New Prime argues that the arbitrator must decide whether the § 1 exemption applies because otherwise the Court would address the merits of the underlying dispute. More specifically, New Prime maintains that "the issue of whether the Plaintiff was an independent contractor or an employee is plainly entangled in the merits of Plaintiff's underlying claims arising out of his alleged misclassification." Docket No. 51, at 6. On

a second appeal in the Van Dusen case,[7] the Ninth Circuit rejected a similar argument, stressing that its prior opinion "expressly held that a district court must determine whether an agreement for arbitration is exempt from arbitration under § 1 of the [FAA] as a threshold matter." Id. The Ninth Circuit directed the district court to "determine whether the Contractor Agreements between each appellant and Swift are exempt under § 1 of the FAA" before considering Swift's motion to compel on remand. Id. Thus, this Court must keep on trucking in the present case to determine whether the two operating agreements Oliveira signed on behalf of Hallmark Trucking LLC are contracts of employment within the § 1 exemption.

ORDER

The defendant's motion to compel arbitration and stay proceedings, and/or dismiss the case for improper venue, or, in the alternative, to dismiss Count III for failure to state a claim (Docket No. 35) is **DENIED** without prejudice. The parties may conduct factual discovery on the threshold question of the plaintiff's status as an employee or independent contractor until January 8, 2016. Any motions for summary judgment shall be filed by January 22, 2016.

---

[7] After the Ninth Circuit denied the writ of mandamus, the plaintiffs moved "for reconsideration of the grant of Swift Transportation Co. Inc.'s motion to compel arbitration." Van Dusen v. Swift Transp. Co., Inc., 544 Fed. App'x 724, 724. The district court denied the motion for reconsideration, but certified a request for an interlocutory appeal. Van Dusen v. Swift Transp. Co., No. 2:10-CV-00899 JWS, 2011 WL 3924831, at *3 (D. Ariz. Sept. 7, 2011).

/s/ PATTI B. SARIS.

Patti B. Saris
Chief United States District Judge

APPENDIX D

INDEPENDENT CONTRACTOR OPERATING AGREEMENT

THIS AGREEMENT is made and entered into this 31 day of May 2013 , by and between NEW PRIME, INC. ("Prime") and ("Contractor" or "You").

Prime is a for-hire motor carrier and utilizes independent contractors to assist in its business. You are willing to lease the following-described tractor (the "Equipment") to Prime for the purpose of hauling freight pursuant to the terms and conditions of this Agreement: 1 Year 2012 Make FRGHT Serial No. 1FUJGLDR9CSBA3671 License No. 12AR5H State MO;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, it is hereby agreed as follows:

1. LEASE. You hereby lease to Prime the Equipment from the date of this Agreement—through December 31 of the same year. Thereafter, this Agreement shall continue from year to year unless otherwise terminated as provided herein. During the term of this Agreement; Prime shall have exclusive possession, control and use of the Equipment and complete responsibility for the operation of the Equipment. The provision in the preceding sentence is set forth solely to conform with federal regulations and is not to be used for any other purposes, including any attempt to classify You as an employee of Prime. 49 CFR 376.12

(c) (4) provides that nothing in the provisions required by 49 CFR 376.12 (c) (1) is intended to effect whether You or any driver provided by You is an independent: contractor or an employee of the Carrier.

Prime shall retain the original of this Agreement, a signed copy shall be maintained in each piece of the Equipment, and one signed copy shall be maintained by You.

2. SERVICE. The parties agree that the intent of this Agreement is to establish an independent contractor relationship at all times. You agree to make the Equipment available to Prime, with qualified and Prime Certified drivers, to pick up loads and transport them to; destinations designated by various shippers. You shall determine the means and methods of performance of all transportation services undertaken under the terms of this Agreement, including driving times and deliver routes. You may refuse to haul any load offered to You by Prime. You have the right to provide services for another carrier during the term of this Agreement, provided that (i) You remove all identification devices, licenses and base plate's from the Equipment and return to Prime, and (i.i.) You provide Prime five (5) business days u notice of Your intent to provide services for another carrier.

3. PAYMENT. Prime shall play You amounts,' as itemized on Schedule 1 within fifteen (15) days after You give Prime properly completed logs and al documents required by the shippers of loads You haul in order for Prime to be paid. All such payments shall be reflected In an operator's settlement which Prime shall produce both on a weekly basis and as a final statement following termination (the "Settlement").

Upon termination of this Agreement, Your final payment is contingent upon Your removal of all Prime identification devices. Prime will be entitled to recover from You those devices in the form of decals or placards on the Equipment and return of those devices to Prime in the manner specified in paragraph 7(d) hereof, unless they are painted directly on the Equipment, together with all of Your Comdata cards. If an identification device has been lost or stolen, a letter certifying that fact shall suffice. Payment to You shall be made contingent upon submission of a bill of lading to which no exceptions shall be taken.

4. QUALCOMM. Your Equipment must contain a Qualcomm unit which will work in conjunction with Prime's Qualcomm System. You hereby authorize Prime to deduct amounts specified in Schedule from Your Settlement to make such rental payments together with all monthly usage fees, including Excess message charges. You are responsible for the timely return of any rented Qualcomm device upon the termination: of this Agreement. If you lease a Qualcomm unit from Prime land if the unit is damaged or lost You agree to reimburse Prime the entire cost incurred by Prime in repairing or replacing the unit. You hereby authorize Prime to deduct an amount equal to the cost from Your Settlement at such time as Prime chooses. If the unit is not returned upon termination, You agree to reimburse Prime its cost incurred in replacing the unit and You hereby authorize Price to deduct such cost from Your final Settlement. If funds are not available to do so, You agree to pay Prime its cost of collection including reasonable attorney's fees.

5. ADVANCES. If You have secured advances from Prime, You hereby authorize Prime to deduct an

amount equal to the advances from Your Settlement at such time as Prime chooses.

6. **TRAILER INSPECTION**. You agree to make a visual inspection prior to assuming control of trailers furnished by Prime: and immediately report any existing damage or defects, and also to report any damage that occurs while the trailer is under Your control. If You fail Ito report any existing damage or defects prior to assuming control of the trailer, and the next driver following You who assumes controlled that trailer reports damage or defects prior to his assuming control, then You agree to pay to Prime the actual cost of repairing such damage or defects.' You hereby authorize Prime to deduct from Your Settlement lament an amount equal to the cost of repair.

7. **PERFORMANCE BOND.**

(a) Amount and Set Off. You will deposit with Prime One Thousand Dollars ($1,000.00) as security for the full performance of Your financial obligations to Prime as set forth in this Agreement. Prime may set off any part of the Performance Bond against (i) cash advances made by Prime to You or for the benefit of Your drivers; (ii) all expenses specifically itemized in paragraphs 8, 9 and 10 hereof; (iii) all costs of Your insurance for coverages itemized in paragraph 11 hereof which Prime has advanced payment for; (iv) automobile liability, cargo and trailer damage claims for which You are liable to Prime as set forth in paragraph 12 hereof; (v) all amounts charged by Prime pursuant to paragraph 13 hereof; (vi) advances made to You or on Your behalf as specified in Schedule 2 hereof; (vii) all amounts charged You by Prime or paid on Your behalf by Prime as itemized on Schedule 3

hereof and accounted for in Your Weekly Settlement; (viii) advances set forth in paragraph 29; and (ix) all other obligations incurred by You, which have been specified in this Agreement. If Performance Bond funds are set puff, You shall provide additional money so that the Performance Bond equals One Thousand Dollars ($1,000.00). In the event You fail to replenish the Performance Bond as required, You hereby authorize Prime to deduct from Your Settlement amounts necessary to replenish the Performance Bond as required. If you do not deposit the full amount of the Performance Bond, You authorize Prime to deduct from Your Settlement the amounts indicated in Schedule 3 in order to fulfill this obligation.

(b) Interest. Prime will pay You interest on the Performance Bond quarterly. This Interest rate shall be equal to the average yield on Ninety-One (91) Day, Thirteen (13) Week Treasury Bills as established in the weekly auction by the Department of the Treasury.

(c) Accounting. Prime will provide You an accounting of the Performance Bond it any time requested by You. Prime shall also indicate on Your Settlement sheets the amounts and description of any deductions or additions made to the Performance Bond.

(d) Return. Upon termination of this Agreement, in order to have the Performance 55M—Returned to You, You must first return to Prime all of Prime's placards and other identification devices, other than those painted directly on the Equipment; Your Comdata card, all base plates, permits, licenses, pre-pass toll transponder, properly completed logs

and documents necessary to receive payments for trips made under this Agreement, You may either bring these items to Prime's terminal or deliver them to Prime via mail or other form of conveyance of Your choice. If You bring the Equipment to Prime's terminal Prime will remove all identification devices. If not, You shall be responsible for their removal. Prime shall provide a final accounting, itemizing all deductions, and return all amounts due You from the Performance Bond within forty-five (45) days of the termination.

8. EXPENSES. You shall pay all operating and maintenance expenses in connection with the operation of the Equipment, including but not limited to fuel, fuel taxes, Federal Highway Use Taxes, tolls, ferries, detention, accessorial services, tractor repairs and Seventy-Two percent (72%) of any agent or brokerage fees charged against line haul revenues received by Prime for any freight transported by You. At your request, Prime will make advances for the payment of such expenses, and You hereby authorize Prime to deduct from Your Settlement amounts equal to the advances. Except when a violation results from Your acts or omissions, Prime shall assume the risk and costs of fines for overweight and oversized trailers when the trailers are preloaded, sealed, or the load is containerized) or when the trailer or lading is otherwise outside Your control, and for improperly permitted over-dimensions and overweight loads. Prime shall reimburse You for any fines paid by You which are Prime's responsibility. You shall be responsible for loading and unloading of trailers.

9. LICENSES, PERMITS AND AUTHORIZATIONS.

(a) **Purchase**. You are required to obtain, at Your expense, a base plate under the international Registration Plan("IRP") permitting the Equipment to be operated in all forty-eight (48), contiguous states. Alternatively, You may authorize Prime to obtain on Your behalf, but at Your expense, all licenses, permits, IRP base plates and authorizations required .for operation of the Equipment. Upon such authorization You agree to reimburse Prime for such expenses, and You hereby authorize Prime to make the deductions from Your Settlement amounts as set forth in Schedule 3.

(b) Return. During the term of the Agreement, as well as after termination, all licenses, permits, base plates; pre-pass toll transponder and authorizations, as well as all placards, provided to You by Prime shall be the property of Prime, and upon termination of this Agreement, You shall, within seven (7) days return all such licenses, permits, base plates, pre-pass toll transponder, placards and authorizations to Prime. All identification devices shall be returned in the manner specified in paragraph 7(d) hereof. Any unused portion of the base plate will be credited to You if Prime receives a refund or credit from the issuing authority or upon transfer to any other vehicle in Prime's fleet.

10. **DRIVERS**. You shall (i) drive the Equipment Yourself, (ii) employ, on Your own behalf, drivers for the Equipment, or (iii) lease drivers for the Equipment.

(a) **Contractor's Employees**. If You employ, on Your own behalf drivers for the Equipment, you shall be sole. responsible for payment of their

wages, benefits, Social Security taxes, withholding taxes unemployment insurance fees, and all other amounts required government agencies to be paid by employers on behalf of or to employees. All by drivers employed by You to operate the Equipment shall be qualified so as to meet requirements of all federal, state and local laws and the rules, and regulations of the Department of Transportation. All such drivers must first be certified by Prime. You shall likewise employ on Your Own behalf and' at Your own expense all driver's helpers and other laborers required to carry out the purpose of this Agreement. At Your request, Prime shall' make payments to Your employees and for their benefit and on their behalf. You shall reimburse Prime for all such expenses and hereby authorize Prime to deduct from Your Settlement amounts required to make such reimbursements. All such reimbursements shall be equal to payments made by Prime.

(b) Leased Drivers. If You lease drivers for the Equipment, You hereby authorize Prime to make advances for all amounts required to reimburse the leasing entity with whom You contracted for services of the drivers. You shall reimburse Prime for all such, expenses and hereby authorize Prime to deduct from your Settlement amounts required to make such reimbursements. All such reimbursements shall be equal to payments made by Prime. All Leased Drivers must first be certified by` rime.

11. INSURANCE

(a) Liability. Prime shall provide and maintain auto liability insurance for the protection of the public pursuant to FMCSA Regulations under 49

USC 13906. Said liability insurance may not necessarily insure You against loss.

(b) **Non-Trucking Use Auto Liability Coverage**. You shall provide and maintain at Your own expel-se non-trucking use auto liability insurance coverage. This coverage, whether referred to As "bobtail", unladened", "deadhead" or otherwise, shall provide coverage for all risks for movement of the Equipment when it is not under dispatch by Prime. Prime shall be named as an additional insured on the policy, which shall 'have limits of not less than $1 million per occurrence, CSL. This policy of insurance shall be primary to and without right of contribution from all other insurance available to Prime.

(c) **Cargo Insurance**. Prime shall secure and maintain Cargo Liability Insurance.

(d) **Physical Damage Insurance**. Prime shall provide and maintain at its own expense physical damage insurance on its trailers.

(e) **Occupational Injuries**. You shall either (i) make an election to procure Workers' Compensation Insurance protection against injuries sustained while in pursuit of Your] business, for Yourself and Your drivers, and thereafter provide and maintain at Your own expense such insurance; or (ii) provide and maintain at Your expense a suitable alternative insurance, such as occupational accident insurance, for Yourself and Your drivers, which insurance must be approved by Prime.

(f) **Health and Life Insurance**. You may elect to purchase health and life insurance through Prime.; It You do sod You hereby authorize Prime to deduct such cost from Your Settlement. Because such

insurance may not go into effect at the time of the execution of this Agreement, and the premiums may change from time to time, You agree that the 'provisions of paragraph 18 of this Agreement apply to such deductions. The cost of this insurance shall be the actual premium charged by the 'insurance company. However, under some health policies of insurance which Prime purchases, a portion of the premium may be retained by Prime in a claims pool for the purpose of paying claims. If, at the end of the policy period, there are any funds remaining in the claims pool, Prime retains those funds.

(g) Procuring of Insurance by Prime. Upon Your request, an insurance broker working with Prime and knowledgeable of the requirements within this Agreement will provide You with coverage information and applications for insurance coverage required of You by this Agreement. If You elect to procure insurance through that insurance broker, You hereby authorize Prime to deduct the cost of such insurance from Your Settlement and forward those amounts to such insurance broker. The cost of all such insurance coverages shall be itemized On Schedule 3 of this Agreement. Prime, or the insurance broker, will furnish to You a certificate of insurance for each policy You purchase and a copy of leach policy shall be furnished to You upon request. You shall remain financially responsible to the insurance broker and/or insurer for any insurance costs not paid due to an insufficiency of Settlement funds.

(h) Proof of Insurance. All insurance coverage provided by You as required by this Agreement shall be in form and 'substance, and issued by a company satisfactory to Prime. You shall continuously

provide Prime with proof of such insurance either by ',current binder or certificates of insurance from the date of the execution of this Agreement until its termination.

12. ACCIDENTS, CLAIMS, LOSSES AND EXPENSES.

(a) **Auto Liability**. Prime and its auto liability insurer may settle any claim against Prime arising out of the maintenance, use or control of the Equipment. You shall pay Prime Up to Five Hundred Dollars ($500.00) per occurrence for the settlement of any such claim and related expenses.

(b) Cargo. You shall pay Prime up to Five Hundred Dollars ($500.00) per occurrence toward the settlement of cargo losses directly caused by fire, collision, overturning of vehicle, collapse of bridges or docks, rising navigable waters oil river floods, perils of the seas, lakes, rivers or inland water while on ferries only, and cyclone, tornado or windstorm. If cargo losses are caused by any peril other than those itemized above, You will pay Prime that portion of such losses and expenses for which Prime does not receive payment from their insurance carrier.

(c) **Damage to Trailers**. You shall pay Prime up to Five Hundred Dollars ($500.00) per occurrence toward loss of, damage to, or liens for storage with respect to Prime's trailers which: are used by You when such losses are covered by Prime's insurance. When 'the loss of, damage to, or liens for storage of Prime's trailers which are used by You are not covered by insurance, You shall pay for all such losses, including expenses and attorneys' fees.

(d) Authorization to Deduct. You Hereby authorize Prime to deduct from Your Settlement all amounts due Prime under this paragraph 12. Prime shall provide You with a written explanation and itemization of any such deductions for cargo or property damage before such deductions are made.

(e) **HOLD HARMLESS AND INDEMNIFICATION**. YOU **AGREE** TO **INDEMNIFY** AND **HOLD HARMLESS PRIME**, ITS **AFFILIATED** COMPANIES AND THEIR RESPECTIVE OFFICERS, DIRECTOR, **SHAREHOLDERS, EMPLOYEES, AGENTS**, SUCCESSORS **AND ASSIGNS, FROM AND AGAINST ANY AND ALL LIABILITIES AND** EXPENSES WHATSOEVER, INCLUDING, WITHOUT LIMITATION, CLAIMS, DAMAGES, JUDG**MENTS, AWARDS, SETTLEMENTS, INVESTIGATIONS, COSTS AND ATTORNEY'S FEES (COLLECTIVELY, "CLAIMS") WHICH ANY OF THEM MAY INCUR OR BECOME OBLIGATED TO PAY ARIS**ING OUT OF YOUR ACTS OR OMISSION OR THOSE OF YOUR AGENTS AND EMPLOYEES (INCLUDING DRIVERS LEASED YOUR PRIME). YOU FURTHER AGREE TO HOLD PRIME HARMLESS AND TO INDEMNIFY PRIME AGAINST ALL CLAIMS BY YOU AND YOUR AGENTS AND EMPLOYEES. I UNDERSTAND THAT THIS PARAGRAPH LIMITS MY RIGHTS AND I ACKNOWLEDGE MY OPTION TO SEEK INDEPENDENT LEGAL COUNSEL AND ADVICE.

13. OPERATING STATEMENT AND PAYROLL SERVICES. At your request, Prime may provide You with an operating statement, and You nearby authorize Prime to make a deduction from Your Settlement an amount as set forth in Schedule 3. In the event

Primero vides services for Your co-drivers, You hereby authorize Prime to make a deduction from Your Settlement in amount as set forth in Schedule 3.

14. CITATIONS. At Your request, Prime shall provide You with administrative services in connection with citations You receive while operating under Prime's authority, and advance money for payment of them. You agree to pay and hereby authorize Prime to deduct from Your Settlement an amount equal to the fee as set forth in Schedule 3, as well as an amount equal. to the payment made ion Your behalf. You are under no obligation to submit Your citations to Prime for handling. However, You agree to report all citations to Prime.

15. FUEL CARD EXPRESS CODES TRIP EXPRESS CHARGE. You agree that, in in the event You utilize Prime's fuel card system and express code transaction system, You will pay to Prime and hereby authorize Prime to deduct from Your Settlement an amount as set forth in Schedule 3.

16. TRACTOR PAYMENT DEDUCTION (IF APPLICABLE). You are leasing X or purchasing _ (check one) Your tractor from SUCCESS LEASING Your payments are itemized in Schedule 2 attached hereto and made a part hereof. In addition, You are required by Your lessor or lender to place certain sums in reserve accounts as itemized in schedule 2. By initialing Schedule 2 You authorize and request Prime to deduct those sums itemized in Schedule 2 from Your Settlement and forward them to Your lessor or lender. If the agreement with Your lessor or lender authorizes Prime to make deductions from Prime's Settlement with You for rental or purchase payments, You must

(d) Authorization to Deduct. You Hereby authorize Prime to deduct from Your Settlement all amounts due Prime under this paragraph 12. Prime shall provide You with a written explanation and itemization of any such deductions for cargo or property damage before such deductions are made.

(e) HOLD HARMLESS AND INDEMNIFICATION. YOU AGREE TO INDEMNIFY AND HOLD HARMLESS PRIME, ITS AFFILIATED COMPANIES AND THEIR RESPECTIVE OFFICERS, DIRECTOR, SHAREHOLDERS, EMPLOYEES, AGENTS, SUCCESSORS AND ASSIGNS, FROM AND AGAINST ANY AND ALL LIABILITIES AND EXPENSES WHATSOEVER, INCLUDING, WITHOUT LIMITATION, CLAIMS, DAMAGES, JUDGMENTS, AWARDS, SETTLEMENTS, INVESTIGATIONS, COSTS AND ATTORNEY'S FEES (COLLECTIVELY, "CLAIMS") WHICH ANY OF THEM MAY INCUR OR BECOME OBLIGATED TO PAY ARISING OUT OF YOUR ACTS OR OMISSION OR THOSE OF YOUR AGENTS AND EMPLOYEES (INCLUDING DRIVERS LEASED YOUR PRIME). YOU FURTHER AGREE TO HOLD PRIME HARMLESS AND TO INDEMNIFY PRIME AGAINST ALL CLAIMS BY YOU AND YOUR AGENTS AND EMPLOYEES. I UNDERSTAND THAT THIS PARAGRAPH LIMITS MY RIGHTS AND I ACKNOWLEDGE MY OPTION TO SEEK INDEPENDENT LEGAL COUNSEL AND ADVICE.

13. OPERATING STATEMENT AND PAYROLL SERVICES. At your request, Prime may provide You with an operating statement, and You nearby authorize Prime to make a deduction from Your Settlement an amount as set forth in Schedule 3. In the event

Primero vides services for Your co-drivers, You hereby authorize Prime to make a deduction from Your Settlement in amount as set forth in Schedule 3.

14. **CITATIONS**. At Your request, Prime shall provide You with administrative services in connection with citations You receive while operating under Prime's authority, and advance money for payment of them. You agree to pay and hereby authorize Prime to deduct from Your Settlement an amount equal to the fee as set forth in Schedule 3, as well as an amount equal. to the payment made ion Your behalf. You are under no obligation to submit Your citations to Prime for handling. However, You agree to report all citations to Prime.

15. FUEL CARD EXPRESS CODES TRIP EXPRESS CHARGE. You agree that, in in the event You utilize Prime's fuel card system and express code transaction system, You will pay to Prime and hereby authorize Prime to deduct from Your Settlement an amount as set forth in Schedule 3.

16. TRACTOR PAYMENT DEDUCTION (IF APPLICABLE). You are leasing X or purchasing _ (check one) Your tractor from SUCCESS LEASING Your payments are itemized in Schedule 2 attached hereto and made a part hereof. In addition, You are required by Your lessor or lender to place certain sums in reserve accounts as itemized in schedule 2. By initialing Schedule 2 You authorize and request Prime to deduct those sums itemized in Schedule 2 from Your Settlement and forward them to Your lessor or lender. If the agreement with Your lessor or lender authorizes Prime to make deductions from Prime's Settlement with You for rental or purchase payments, You must

provide Prime with a copy of that agreement and It shall be attached to this Agreement and made a part hereof by this reference.

17. ADDITIONAL SETTLEMENT DEDUCTIONS. From time to time, You may purchase fuel, products or services, including repairs, which are charged to Prime. When You do so, You hereby authorize Prime to deduct from Your Settlement amounts equal to such charges. You are never required to charge any amounts to Prime's account not to make purchases from any vendor recommended by Prime. Further, if You lease Your tractor, You may be required by Your lessor to indemnify Your lessor for claims arising out of Your acts and omissions as well as those of Your agents and employees, and to pay for portions of any loss or damage to Your tractor, When Your lease requires any such payments, You hereby authorize Prime to deduct from Your settlement amounts equal to such charges.

18. RATIFICATION OF DEDUCTIONS. In paragraphs 4, 5, 6, 7, 8, 9, 10, 11(f), 12, 14, 17 and 1-9 at this Agreement, Prime has agreed to make certain advances to You or on Your behalf. You have agreed to allow Prime to make deductions from Your Settlement as reimbursement for those advances. Because those advances are not capable of determination at the time of the execution of this Agreement, they shall be disclosed to You from time to time in Your Settlement. To the extent Prime is required to disclose deductions to You, that requirement regarding any such deductions shall be deemed fulfilled through Prime providing You with a Settlement. However, upon request, Prime will provide You copies of those documents which are necessary to determine the validity of the

charge. Computation of each item shall be on the basis of, the actual amount of each advance, charge or expense. If You have not objected to any such deduction in writing within ninety (90) days of the date of the Settlement, the deduction shall be deemed ratified by You.

19. NEGATIVE BALANCE. If You have a negative balance on Your Settlement after calculating all payments dud You less all deductions authorized herein, and if Prime has not offset that negative amount, against Your security deposit, You agree to pay to Prime interest On such negative balance at a rate equal to the average yield on Ninety-One-Day, Thirteen-Week Treasury Bills as established in the weekly auction by the Department of Treasury. Interest shall be paid on the average weekly amount of Your negative balance.

If You have a substantial negative balance on that Your cash flow is affected, and if Prime agrees, You may convert some or all of that negative balance to periodic payments to Prime (the "Advance"). In that event You and Prime shall agree on the frequency of payments and You agree to pay to Prime interest on the Advance at the rate of 12% per annum. Provided, however in the event the Prime Rate (of U. S. money center commercial banks as published in The Wall Street Journal) shall equal or exceed 10%, You agree to pay to Prime interest on the Advance at the Prime Rate plus 2%.

20. FREIGHT BILLS AND TARIFFS. Prime shall provide You with a copy of Prime's rated freight bill or a computer-generated document containing the same information, and, upon request, You shall have

the right to examine Prime's tariffs at all reasonable times, as well as documents from which contract rates and charges are computed. Mileage is based on the latest version of the Household Goods Carrier's Bureau Mileage Guide, unless otherwise specified by Prime's customers.

21. **PRIME'S SERVICES, PRODUCTS AND EQUIPMENT**. You shall not be required to purchase or rent any products, equipment or services from Prime as a condition of entering into this Agreement. In the event that You elect to purchase or rent any products, equipment or services from or through Prime, You agree that Prime may deduct amounts due for such products, equipment or services from the compensation due You. You and Prime agree that such amounts will include the cost of such products equipment or services and may include amounts to cover Prime's administrative costs, either direct or indirect, of securing, offering and maintaining such products, equipment and services.

22. **TERMINATION**. Either party may Terminate this Agreement by giving (30) days written notice of such intention to the other party. In the event either party commits a material breach of this Agreement, the other shall have the right to terminate this Agreement by giving five (5) days' written notice of such intention. Shipping requirements of Prime's customers are an essential part of Prime's business, and failure to adhere to such requirements may be deemed to be a material breach of this Agreement. The DOT has charged Prime with the duty of requiring You to observe safety standards while operating the Equipment under Prime's authority. It is agreed that Prime may

terminate this Agreement immediately if it has information or knowledge or belief that the safety of the public is, being endangered by You or Your agents or employees in the operation of the Equipment. In the event this Agreement is terminated by either party or upon the expiration of this Agreement You shall, within forty-eight (48) hours, return all of Prime's property to Prime at a location specifically designated by Prime. If You shall fail to return Prime's property as provided herein, You shall be responsible for all expenses incurred by Prime in securing the proper return of said property. Such expenses may be charged back against any amounts owed You by Prime.

23. NOTICES. All notices, requests, instructions, consents and other communications to be given pursuant to this Agreement shall be in writing and shall be deemed received (i) on the same day if delivered in person, by same day courier or by telegraphy telex or facsimile transmission; (ii) on the next day if delivered by overnight mail or courier; or (iii) on the date indicated on the return receipt, or if there is no such receipt, on the third calendar day (excluding Sundays) if delivered by certified or registered mail, postage prepaid, to the party for whom intended to the following addresses:

If to Prime: Manager, Contractor Relations
P.O. Box 4208
Springfield, MO 65808

If to Contractor: HALLMARK TRUCKING LLC
40 DUGGAN DR
LEOMINSTER MA 01453

Each party may, by written notice given to the other in accordance with this Agreement, change the address to which notices to such party are to be delivered.

24. **RELATIONSHIP OF PARTIES.** The parties intend to create by this Agreement the relationship of carrier and Independent Contractor and not an employer/employee relationship. You are and shall be deemed for all purposes to be an Independent Contractor 'not an employee of Prime. Neither You, Your employees, agents or servants, if any, are to be considered employees of Prime at any time, under any circumstance or for any purpose.

25. **ASSIGNMENT**. You shall not assign this Agreement or any rights or obligations hereunder to anyone Without the written consent of Prime.

26. **DESIGNATION OF PAYEE**. You agree that, in the event there is more than one (1) individual named as the Contractor on the face age of this Agreement, that those persons so named will designate in writing which one of them shall be entitled to receive the weekly Settlement check due under the terms of this Agreement. Any change in such designation must be in writing and must be executed by all individuals named as Contractor herein. The purpose of this paragraph is to allow Prime to make one (1) Settlement check payable to one (1) of the individuals named as Contractor without retaining any exposure whatsoever for payment to the other named Contractor.

The following named Co-Contractor is hereby designated as the individual to receive all weekly Settlement checks in this name only:

APPROVED: _____

_____

27. MODIFICATION OF SCHEDULES. From time to time during the term of this Agreement amounts required to purchase insurance from a Prime affiliate or through Prime, lease or purchase payments, reserve account requirements, Qualcomm user fees and other like items may be changed from those amounts set forth on the Schedules attached hereto by the person making such charges, In such event and upon receipt in writing of notice of such modification by Prime from the person making the modification, Prime shall notify You in writing of such change. Unless You instruct Prime in writing to the contrary within ten (10) days of the date of Prime's notice to You, the appropriate Schedule shall be deemed modified to reflect the new amount bring charged and the Schedule shall be deemed by the parties as being amended accordingly.

28. SET-OFF. You hereby rant to Prime the right of immediate set off against Your weekly Settlement of all amounts due from You to Prime under the terms of this Agreement.

29. LEASE EXPENSES ADVANCES. If You lease Your Tractor from Success Leasing, Inc. ("Success"), Our Lease contains financial obligations in addition to Lease Charges, Excess Mileage charge and Tire Replacement Reserve. Those additional obligations are foundling paragraphs 10, 12, 14, 15, 17 and 19(d) of Your Lease. Those obligations may be advanced by Success or Prime on Your behalf. In the event they are, You hereby authorize Prime to deduct from Your Settlement or Your Performance Bond

amounts equal to such advances and remit to the entity which made the advance. The amount deducted shall be the actual cost of each such obligation.

30. GOVERNING LAW AND ARBITRATION. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF MISSOURI. ANY DISPUTES ARISING UNDER, ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING AN ALLEGATION OF BREACH THEREOF, AND ANY DISPUTES ARISING OUT OF OR RELATING TO THE RELATIONSHIP CREATED BY THE AGREEMENT, AND ANY DISPUTES AS TO THE RIGHTS AND OBLIGATIONS OF THE PARTIES, INCLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION IN ACCORDANCE WITH MISSOURI'S ARBITRATION ACT AND/OR THE FEDERAL ARBITRATION ACT, ANY ARBITRATION BETWEEN THE PARTIES WILL BE GOVERNED BY THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION (THE RULES"). THE PARTIES SPECIFICALLY AGREE THAT NO DISPUTE MAY BE JOINED WITH THE DISPUTE OF ANOTHER AND AGREE THAT CLASS ACTIONS UNDER THIS ARBITRATION PROVISION ARE PROHIBITED. IN THE EVENT OF CONFLICT BETWEEN THE RULES AND THE PROVISIONS OF THIS AGREEMENT, THE PROVISIONS OF THIS AGREEMENT SHALL CONTROL. EXCEPTIONS/CLARIFICATIONS OF THE RULES INCLUDE: (i) THE PROCEEDINGS SHALL BE CONDUCTED BY A SINGLE, NEUTRAL ARBITRATOR TO BE SELECTED BY THE PARTIES, OR, FAILING

THAT, APPOINTED IN ACCORDANCE WITH THE RULES, (ii) THE SUBSTANTIVE LAW OF THE STATE OF MISSOURI SHALL APPLY, AND (iii) THE AWARD SHALL BE CONCLUSIVE AND BINDING. A DEMAND FOR ARBITRATION SHALL BE FILED NOT LATER THAN ONE (1) YEAR AFTER THE DISPUTE ARISES OR THE CLAIM ACCRUES, AND FAILURE TO FILE SAID DEMAND WITH THE ONE (1) YEAR PERIOD SHALL BE DEEMED A FULL WAIVER OF THE CLAIM. THE PLACE OF THE ARBITRATION HEREIN SHALL BE SPRINGFIELD, MISSOURI. BOTH PARTIES AGREE TO BE FULLY AND FINALLY BOUND BY THE ARBITRATION AWARD, AND JUDGMENT MAY BE ENTERED ON THE AWARD IN ANY COURT HAVING JURISDICTION THEREOF. THE PARTIES AGREE THAT THE ARBITRATION FEES SHALL SPLIT BETWEEN THE PARTIES, UNLESS CONTRACTOR SHOWS THAT THE ARBITRATION FEES WILL IMPOSE A SUBSTANTIAL FINANCIAL HARDSHIP ON CONTRACTOR AS DETERMINED BY THE ARBITRATOR, IN WHICH EVENT PRIME WILL PAY THE ARBITRATION FEES.

31. **ENTIRE AGREEMENT**. This Agreement shall be comprised of this document executed below by You and Prime as well as all Schedules initialed by You (as amended from time to time as herein provided). Together they constitute the entire agreement between the parties hereto and may not be modified or amended except by written agreement executed by both parties or, in the case of the Schedules, as otherwise herein provided.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the day and year first written herein.

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

NEW PRIME, INC.

By: _____

"Prime"

_____

_____

"Contractor"

By Your initials on this page You acknowledge receipt of a copy of this Agreement from Prime _____

_____

"Co-Contractor"

APPENDIX E

INDEPENDENT CONTRACTOR OPERATING AGREEMENT

THIS AGREEMENT is made and entered into this 12 day of March, 2014, by and between NEW PRIME, INC. ("Prime") and ("Contractor" or "You").

Prime is a for-hire motor carrier and utilizes independent contractors to assist in its business. You are willing to lease the following-described tractor (the "Equipment") to Prime for the purpose of hauling freight pursuant to the terms and conditions of this Agreement: Year 2015 Make FRGHT Serial No.3AKJGLD54FSFN2731 License No. _____ State MO

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, it is hereby agreed as follows:

1. LEASE. You hereby lease to Prime the Equipment from the date of this Agreement through December 31 of the same year. Thereafter, this Agreement shall continue from year to year unless otherwise terminated as provided herein. During the term of this Agreement, Prime shall have exclusive possession, control and use of the Equipment and complete responsibility for the operation of the Equipment. The provision in the preceding sentence is set forth solely to conform with federal regulations and is not to be used for any other purposes, including any attempt to classify You as an employee of Prime. 49 CFR 376.12

(c) (4) provides that nothing in the provisions required by 49 CFR 376.12 (c) (1) is intended to effect whether You or any driver provided by You is an independent contractor or an employee of the Carrier.

Prime shall retain the original of this Agreement, a signed copy shall be maintained in each piece of the Equipment, and one signed copy shall be maintained by You.

2. SERVICE. The parties agree that the intent of this Agreement is to establish independent contractor relationship at all times. You agree to make the Equipment available to Prime, with qualified and Prime Certified drivers, to pick up loads and transport them to destinations designated by various shippers. You shall determine the means and methods of performance of all transportation services undertaken under the terms of this Agreement, including driving times and delivery routes. You may refuse to haul any load offered to You by Prime. You have the right to provide services for another carrier during the term of this Agreement, provided that (i) You remove all identification devices, licenses and base plates from the Equipment and return to Prime, and (ii) You provide Prime five (5) business days' notice of Your intent to provide services for another carrier.

3. PAYMENT. Prime shall pay You amounts as itemized on Schedule 1 within fifteen (15) days after You give Prime properly completed logs and all documents required by the shippers of loads You haul in order for Prime to be paid. All such payments shall be reflected in an operator's settlement which Prime shall produce both on a weekly basis and as a final statement following termination (the "Settlement").

Upon termination of this Agreement, Your final payment is contingent upon Your removal of all Prime identification devices. Prime will be entitled to recover from You those devices in the form of decals or placards on the Equipment and return of those devices to Prime in the manner specified in paragraph 7(d) hereof, unless they are painted directly on the Equipment, together with all of Your Comdata cards. If an identification device has been lost or stolen, a letter certifying that fact shall suffice. Payment to You shall be made contingent upon submission of a bill of lading to which no exceptions shall be taken.

4. QUALCOMM. Your Equipment must contain a Qualcomm unit which will work in conjunction with Prime's Qualcomm system. You hereby authorize Prime to deduct amounts specified in Schedule 3 from Your Settlement to make such rental payments together with all monthly usage fees, including Excess message charges. You are responsible for the timely return of any rented Qualcomm device upon the termination of this Agreement. If you lease a Qualcomm unit from Prime, and if the unit is damaged or lost, You agree to reimburse Prime the entire cost incurred by Prime in repairing or replacing the unit. You hereby authorize Prime to deduct an amount equal to the cost from Your Settlement at such time as Prime chooses. If the unit is not returned upon termination, You agree to, reimburse Prime its cost incurred in replacing the unit and You hereby authorize Prime to deduct such cost from Your final Settlement. If funds are not available to do so, You agree to pay Prime its cost of collection including reasonable attorney's fees.

5. ADVANCES. If You have secured advances from Prime, You hereby authorize Prime deduct an

amount equal to the advances from Your Settlement at such time as Prime chooses.

6. **TRAILER INSPECTION**. You agree to make a visual inspection prior to assuming control of trailers furnished by Prime and immediately report any existing damage or defects, and also to report any damage that occurs while the trailer is under Your control. If You fail to report any existing damage or defects prior to assuming control of the trailer, and the next driver following You who assumes control of that trailer reports damage or defects prior to his assuming control, then You agree to pay to Prime the actual cost of repairing such damage or defects. You hereby authorize Prime to deduct from Your Settlement an amount equal to the cost of repair.

7. **PERFORMANCE BOND.**

(a) **Amount and Set Off**. You will deposit with Prime Fifteen Hundred Dollars ($1,500.00) as security for the full performance of Your financial obligations to Prime as set forth in this Agreement. Prime may set off any part of the Performance Bond against (i) cash advances made by Prime to You or for the benefit of Your drivers; (ii) all expenses specifically itemized in paragraphs 8, 9 and 10 hereof; (iii) all costs of Your insurance for coverages itemized in paragraph 11 hereof which Prime has advanced payment for; (iv) automobile liability, cargo and trailer damage claims for which You are liable to Prime as set forth in paragraph 12 hereof; (v) all amounts charged by Prime pursuant to paragraph 13 hereof; (vi) advances made to You or on Your behalf as specified in Schedule 2 hereof; (vii) all amounts charged You by Prime or paid on Your behalf by Prime as itemized on Schedule 3

hereof and accounted for in Your Weekly Settlement; (viii) advances set forth in paragraph 29; and (ix) all other obligations incurred by You which have been specified in this Agreement. If Performance Bond funds are set off, You shall provide additional money so that the Performance Bond equals Fifteen Hundred dollars ($1,500.00). In the event You fail to replenish the Performance Bond as required, You hereby authorize Prime to deduct from Your Settlement amounts necessary to replenish the Performance Bond as required. If You do not deposit the full amount of the Performance Bond, You authorize Prime to deduct from Your Settlement the amounts indicated in Schedule 3 in order to fulfill this obligation.

(b) **Interest**. Prime will pay You interest on the Performance Bond quarterly. This interest rate shall be equal to the average yield on Ninety-One (91) Day, Thirteen (13) Week Treasury Bills as established in the weekly auction by the Department of the Treasury.

(c) **Accounting**. Prime will provide You an accounting of the Performance Bond at any time requested by You. Prime shall also indicate on Your Settlement sheets the amounts and description of any deductions or additions made to the Performance Bond.

(d) Return. Upon termination of this Agreement, in order to have the Performance Bond returned to You, You must first return to Prime all of Prime's placards and other identification devices, other than those painted directly on the Equipment, Your Comdata card, all base plates, permits, licenses,

pre-pass toll transponder, properly completed logs and documents necessary to receive payments for trips made under this Agreement. You may either bring these items to Prime's terminal or deliver them to Prime via mail or other form of conveyance of Your choice. If You bring the Equipment to Prime's terminal, Prime will remove all identification devices. If not, You shall be responsible for their removal. Prime shall provide a final accounting, itemizing all deductions, and return all amounts due You from the Performance Bond within forty-five (45) days of the termination.

8. EXPENSES. You shall pay all operating and maintenance expenses in connection with the operation of the Equipment, including but not limited to fuel, fuel taxes, Federal Highway Use Taxes, tolls, ferries, detention, accessorial services, tractor repairs and Seventy-Two percent (72%) of any agent or brokerage fees charged against line haul revenues received by Prime for any freight transported by You. At your request, Prime will make advances for the payment of such expenses, and You hereby authorize Prime to deduct from Your Settlement amounts equal to the advances. Except when a violation results from Your acts or omissions, Prime shall assume the risk and costs of fines for overweight and oversized trailers when the trailers are preloaded, sealed, or the load is containerized, or when the trailer or lading is otherwise outside Your control, and for improperly permitted over-dimensions and overweight loads. Prime shall reimburse You for any fines paid by You which are Prime's responsibility. You shall be responsible for loading and unloading of trailers.

9. LICENSES, PERMITS AND AUTHORIZATIONS.

(a) **Purchase**. You are required to obtain, at Your expense, a base plate under the International Registration Plan ("IRP") permitting the Equipment to be operated in all forty-eight (48) contiguous states. Alternatively, You may authorize Prime to obtain on Your behalf, but at Your expense, all licenses, permits, IRP base plates and authorizations required for operation of the Equipment. Upon such authorization, You agree to reimburse Prime for such expenses, and You hereby authorize Prime to make the deductions from Your Settlement amounts as set forth in Schedule 3.

(b) Return. During the term of this Agreement, as well as after termination, all licenses, permits, base plates, pre-pass toll transponder and authorizations, as well as all placards, provided to You by Prime shall be the INITIAL property of Prime, and upon termination of this Agreement, You shall, within seven (7) days, return all such licenses, permits, base plates, pre-pass toll transponder, placards and authorizations to Prime. All identification devices shall be returned in the manner specified in paragraph 7(d) hereof. Any unused portion of the base plate will be credited to You if Prime receives a refund or credit from the issuing authority or upon transfer to any other vehicle in Prime's fleet.

10. DRIVERS. You shall (i) drive the Equipment Yourself, (ii) employ, on Your own behalf, drivers for the Equipment, or (iii) lease drivers for the Equipment.

(a) Contractor's Employees. If You employ, on Your own behalf, drivers for the Equipment, You shall be solely responsible for payment of their wages, benefits, Social Security taxes, withholding taxes, unemployment insurance fees, and all other amounts required by government agencies to be paid by employers on behalf of or to employees. All drivers employed by You to operate the Equipment shall be qualified so as to meet requirements of all federal, state and local laws and the rules and regulations of the Department of Transportation. All such drivers must first be certified by Prime. You shall likewise employ on Your own behalf and at Your own expense all driver's helpers and other laborers required to carry out the purpose of this Agreement. At Your request, Prime shall make payments to Your employees and for their benefit and on their behalf. You shall reimburse Prime for all such expenses and hereby authorize Prime to deduct from Your Settlement amounts required to make such reimbursements. All such reimbursements shall be equal to payments made by Prime.

(b) Leased Drivers. If You lease drivers for the Equipment, You hereby authorize Prime to make advances for all amounts required to reimburse the leasing entity with whom You contracted for services of the drivers. You shall reimburse Prime for all such expenses and hereby authorize Prime to deduct from your Settlement amounts required to make such reimbursements. All such reimbursements shall be equal to payments made by Prime. All Leased Drivers must first be certified by Prime.

11. INSURANCE

(a) **Liability**. Prime shall provide and maintain auto liability insurance for the protection of the public pursuant to FMCSA Regulations under 49 USC 13906. Said liability insurance may not necessarily insure You against loss.

(b) **Non-Trucking Use Auto Liability Coverage**. You shall provide and maintain at Your own expense non-trucking use auto liability insurance coverage. This coverage, whether referred to as "bobtail", "unladened", "deadhead" or otherwise, shall provide coverage for all risks for movement of the Equipment when it is not under dispatch by Prime. Prime shall be named as an additional insured on the policy, which shall have limits of not less than $1 million per occurrence, CSL. This policy of insurance shall be primary to and without right of contribution from all other insurance available to Prime.

(c) **Cargo Insurance**. Prime shall secure and maintain Cargo Liability Insurance.

(d) **Physical Damage Insurance**. Prime shall provide and maintain at its own expense physical damage insurance on its trailers.

(e) **Occupational Injuries**. You shall either (i) make an election to procure Workers' Compensation insurance protection against injuries sustained while in pursuit of Your business, for Yourself and' Your drivers, and thereafter provide and maintain at Your own expense such insurance; or (ii) provide and maintain at Your expense a suitable alternative insurance, such as occupational accident insurance, for Yourself and Your drivers, which insurance must be approved by Prime.

(a) Contractor's Employees. If You employ, on Your own behalf, drivers for the Equipment, You shall be solely responsible for payment of their wages, benefits, Social Security taxes, withholding taxes, unemployment insurance fees, and all other amounts required by government agencies to be paid by employers on behalf of or to employees. All drivers employed by You to operate the Equipment shall be qualified so as to meet requirements of all federal, state and local laws and the rules and regulations of the Department of Transportation. All such drivers must first be certified by Prime. You shall likewise employ on Your own behalf and at Your own expense all driver's helpers and other laborers required to carry out the purpose of this Agreement. At Your request, Prime shall make payments to Your employees and for their benefit and on their behalf. You shall reimburse Prime for all such expenses and hereby authorize Prime to deduct from Your Settlement amounts required to make such reimbursements. All such reimbursements shall be equal to payments made by Prime.

(b) Leased Drivers. If You lease drivers for the Equipment, You hereby authorize Prime to make advances for all amounts required to reimburse the leasing entity with whom You contracted for services of the drivers. You shall reimburse Prime for all such expenses and hereby authorize Prime to deduct from your Settlement amounts required to make such reimbursements. All such reimbursements shall be equal to payments made by Prime. All Leased Drivers must first be certified by Prime.

11. INSURANCE

(a) **Liability**. Prime shall provide and maintain auto liability insurance for the protection of the public pursuant to FMCSA Regulations under 49 USC 13906. Said liability insurance may not necessarily insure You against loss.

(b) **Non-Trucking Use Auto Liability Coverage**. You shall provide and maintain at Your own expense non-trucking use auto liability insurance coverage. This coverage, whether referred to as "bobtail", "unladened", "deadhead" or otherwise, shall provide coverage for all risks for movement of the Equipment when it is not under dispatch by Prime. Prime shall be named as an additional insured on the policy, which shall have limits of not less than $1 million per occurrence, CSL. This policy of insurance shall be primary to and without right of contribution from all other insurance available to Prime.

(c) **Cargo Insurance**. Prime shall secure and maintain Cargo Liability Insurance.

(d) **Physical Damage Insurance**. Prime shall provide and maintain at its own expense physical damage insurance on its trailers.

(e) **Occupational Injuries**. You shall either (i) make an election to procure Workers' Compensation insurance protection against injuries sustained while in pursuit of Your business, for Yourself and' Your drivers, and thereafter provide and maintain at Your own expense such insurance; or (ii) provide and maintain at Your expense a suitable alternative insurance, such as occupational accident insurance, for Yourself and Your drivers, which insurance must be approved by Prime.

(f) **Procuring of Insurance by Prime**. Upon Your request, an insurance broker working with Prime and knowledgeable of the requirements within this Agreement will provide You with coverage information and applications for insurance coverage required of You by this Agreement. If You elect to procure insurance through that insurance broker, You hereby authorize Prime to deduct the cost of such insurance from Your Settlement and forward those amounts to such insurance broker. The cost of all such insurance coverages shall be itemized on Schedule 3 of this Agreement. Prime, or the insurance broker, will furnish to You a certificate of insurance for each policy You purchase and a copy of each policy shall be furnished to You upon request. You shall remain financially responsible to the insurance broker and/or insurer for any insurance costs not paid due to an insufficiency of Settlement funds.

(g) **Proof of Insurance**. All insurance coverage provided by You as required by this Agreement shall be in form and substance, and issued by a company satisfactory to Prime. You shall continuously provide Prime with proof of such insurance either by current binders or certificates of insurance from the date of the execution of this Agreement until its termination.

12. ACCIDENTS, CLAIMS, LOSSES AND EXPENSES.

(a) **Auto Liability**. Prime and its auto liability insurer may settle any claim against Prime arising out of the maintenance, use or control of the Equipment. You shall pay Prime up to Five Hundred

Dollars ($500.00) per occurrence for the settlement of any such claim and related expenses.

(b) Cargo. You shall pay Prime up to Five Hundred Dollars ($500.00) per occurrence toward the settlement of cargo losses directly caused by fire, collision, overturning of vehicle, collapse of bridges or docks, rising navigable waters or river floods, perils of the seas, lakes, rivers or inland water while on ferries only, and cyclone, tornado or windstorm. If cargo losses are caused by any peril other than those itemized above, You will pay Prime that portion of such losses and expenses for which Prime does not receive payment from their insurance carrier.

(c) **Damage to Trailers**. You shall pay Prime up to Five Hundred Dollars ($500.00) per occurrence toward loss of, damage to, or liens for storage with respect to Prime's trailers which are used by You when such losses are covered by Prime's insurance. When the loss of, damage to, or liens for storage of Prime's trailers which are used by You are not covered by insurance, You shall pay for all such losses, including expenses and attorneys' fees.

(d) **Authorization to Deduct**. You hereby authorize Prime to deduct from Your Settlement all amounts due Prime under this paragraph 12. Prime shall provide You with a written explanation and itemization of any such deductions for cargo or property damage before such deductions are made.

(e) **HOLD HARMLESS AND INDEMNIFICATION**. YOU AGREE TO INDEMNIFY AND HOLD HARMLESS PRIME, ITS AFFILIATED COMPANIES AND THEIR RESPECTIVE OFFICERS, DIRECTOR, SHAREHOLDERS, EMPLOYEES,

AGENTS, SUCCESSORS AND ASSIGNS, FROM AND AGAINST ANY AND ALL LIABILITIES AND EXPENSES WHATSOEVER, INCLUDING, WITHOUT LIMITATION, CLAIMS, DAMAGES, JUDGMENTS, AWARDS, SETTLEMENTS, INVESTIGATIONS, COSTS AND ATTORNEY'S FEES (COLLECTIVELY, "CLAIMS") WHICH ANY OF THEM MAY INCUR OR BECOME OBLIGATED TO PAY ARISING OUT OF YOUR ACTS OR OMISSION OR THOSE OF YOUR AGENTS AND EMPLOYEES (INCLUDING DRIVERS LEASED FROM PRIME). YOU FURTHER AGREE TO HOLD PRIME HARMLESS AND TO INDEMNIFY PRIME AGAINST ALL CLAIMS BY YOU *AND* YOUR AGENTS AND EMPLOYEES. I UNDERSTAND THAT THIS PARAGRAPH LIMITS MY RIGHTS AND I ACKNOWLEDGE MY OPTION TO SEEK INDEPENDENT LEGAL COUNSEL AND ADVICE.

13. OPERATING STATEMENT AND PAYROLL SERVICES. At your request, Prime may provide You with an operating statement, and You hereby authorize Prime to make a deduction from Your Settlement an amount as set forth in Schedule 3. In the event Prime provides services for Your co-drivers, You hereby authorize Prime to make a deduction from Your Settlement in amount as set forth in Schedule 3.

14. CITATIONS. At Your request, Prime shall provide You with administrative services in connection with citations You receive while operating under Prime's authority, and advance money for payment of them. You agree to pay and hereby authorize Prime to deduct from Your Settlement an amount equal to the fee as set forth in Schedule 3, as well as an amount equal to the payment made on Your behalf. You are

under no obligation to submit Your citations to Prime for handling. However, You agree to report all citations to Prime.

15. FUEL CARD EXPRESS CODES/TRIP EXPRESS CHARGE. You agree that, in in the event You utilize Prime's fuel card system and express code transaction system, You will pay to Prime and hereby authorize Prime to deduct from Your Settlement an amount as set forth in Schedule 3.

16. TRACTOR PAYMENT DEDUCTION (IF APPLICABLE). You are leasing X or purchasing ___ (check one) Your tractor from SUCCESS LEASING Your payments are itemized in Schedule 2 attached hereto and made a part hereof. In addition, You are required by Your lessor or lender to place certain sums in reserve accounts as itemized in Schedule 2. By initialing Schedule 2 You authorize and request Prime to deduct those sums itemized in Schedule 2 from Your Settlement and forward them to Your lessor or lender. If the agreement with Your lessor or lender authorizes Prime to make deductions from Prime's Settlement with You for rental or purchase payments, You must provide Prime with a copy of that agreement and it shall be attached to this Agreement and made a part hereof by this reference.

17. ADDITIONAL SETTLEMENT DEDUCTIONS. From time to time, You may purchase fuel, products or services, including repairs, which are charged to Prime. When You do so, You hereby authorize Prime to deduct from Your Settlement amounts equal to such charges. You are never required to charge any amounts to Prime's account nor to make purchases from any vendor recommended by

Prime. Further, if You lease Your tractor, You may be required by Your lessor to indemnify Your lessor for claims arising out of Your acts and omissions as well as those of Your agents and employees, and to pay for portions of any loss or damage to Your tractor. When Your lease requires any such payments, You hereby authorize Prime to deduct from Your settlement amounts equal to such charges.

18. RATIFICATION OF DEDUCTIONS. In paragraphs 4, 5, 6, 7, 8, 9, 10, 11(f), 12, 14, 17 and 19 of this Agreement, Prime has agreed to make certain advances to You or on Your behalf. You have agreed to allow Prime to make deductions from Your Settlement as reimbursement for those advances. Because those advances are not capable of determination at the time of the execution of this Agreement, they shall be disclosed to You from time to time in Your Settlement. To the extent Prime is required to disclose deductions to You, that requirement regarding any such deductions shall be deemed fulfilled through Prime providing You with a Settlement. However, upon request, Prime will provide You copies of those documents which are necessary to determine the validity of the charge. Computation of each item shall be on the basis of the actual amount of each advance, charge or expense. If You have not objected to any such deduction in writing within ninety (90) days of the date of the Settlement, the deduction shall be deemed ratified by You.

19. NEGATIVE BALANCE. If You have a negative balance on Your Settlement after calculating all payments due You, less all deductions authorized herein, and if Prime has not offset that negative amount against Your security deposit, You agree to

pay to Prime interest on such negative balance at a rate equal to the average yield on Ninety-One-Day, Thirteen-Week Treasury Bills as established in the weekly auction by the Department of Treasury. Interest shall be paid on the average weekly amount of Your negative balance. If You have a substantial negative balance so that Your cash flow is affected, and if Prime agrees, You may convert some or all of that negative balance to periodic payments to Prime (the "Advance"). In that event You and Prime shall agree on the frequency of payments and You agree to pay to Prime interest on the Advance at the rate of 12% per annum. Provided, however, in the event the Prime Rate (of U. S. money center commercial banks as published in The Wall Street Journal) shall equal or exceed 10%, You agree to pay to Prime interest on the Advance at the Prime Rate plus 2%.

20. **FREIGHT BILLS AND TARIFFS**. Prime shall provide You with a copy of Prime's rated freight bill or a computer-generated document containing the same information, and, upon request, You shall have the right to examine Prime's tariffs at all reasonable times, as well as documents from which contract rates and charges are computed. Mileage is based on the latest version of the Household Goods Carrier's Bureau Mileage Guide, unless otherwise specified by Prime's customers.

21. **PRIME'S SERVICES, PRODUCTS AND EQUIPMENT**. You shall not be required to purchase or rent any products, equipment or services from Prime as a condition of entering into this Agreement. In the event that You elect to purchase or rent any products, equipment or services from or through Prime, You agree that Prime may deduct amounts due

for such products, equipment or services from the compensation due You. You and Prime agree that such amounts will include the cost of such products, equipment or services and may include amounts to cover Prime's administrative costs, either direct or indirect, of securing, offering and maintaining such products, equipment and services.

22. TERMINATION. Either party may terminate this Agreement by giving thirty (30) days' written notice of such intention to the other party. In the event either party commits a material breach of this Agreement, the other shall have the right to terminate this Agreement by giving five (5) days' written notice of such intention. Shipping requirements of Prime's customers are an essential part of Prime's business, and failure to adhere to such requirements may be deemed to be a material breach of this Agreement. The DOT has charged Prime with the duty of requiring You to observe safety standards while operating the Equipment under Prime's authority. It is agreed that Prime may terminate this Agreement immediately if it has information or knowledge or belief that the safety of the public is being endangered by You or Your agents or employees in the operation of the Equipment. In the event this Agreement is terminated by either party or upon the expiration of this Agreement, You shall, within forty-eight (48) hours, return all of Prime's property to Prime at a location specifically designated by Prime. If You shall fail to return Prime's property as provided herein, You shall be responsible for all expenses incurred by Prime in securing the proper return of said property. Such expenses may be charged back against any amounts owed You by Prime.

23. NOTICES. All notices, requests, instructions, consents and other communications to be given pursuant to this Agreement shall be in writing and shall be deemed received (i) on the same day if delivered in person, by same day courier or by telegraph, telex or facsimile transmission; (ii) on the next day if delivered by overnight mail or courier; or (iii) on the date indicated on the return receipt, or if there is no such receipt, on the third calendar day (excluding Sundays) if delivered by certified or registered mail, postage prepaid, to the party for whom intended to the following addresses:

If to Prime: Manager, Contractor Relations
P.O. Box 4208
Springfield, MO 65808

If to Contractor: HALLMARK TRUCKING LLC
1125 BARBOUR AVENUE
PORT CHARLOTTE FL 33948

Each party may, by written notice given to the other in accordance with this Agreement, change the address to which notices to such party are to be delivered.

24. RELATIONSHIP OF PARTIES. The parties intend to create by this Agreement the relationship of Carrier and Independent Contractor and not an employer/employee relationship. You are and shall be deemed for all purposes to be an Independent Contractor, not an employee of Prime. Neither You, Your employees, agents or servants, if any, are to be considered employees of Prime at any time, under any circumstance or for any purpose.

for such products, equipment or services from the compensation due You. You and Prime agree that such amounts will include the cost of such products, equipment or services and may include amounts to cover Prime's administrative costs, either direct or indirect, of securing, offering and maintaining such products, equipment and services.

22. TERMINATION. Either party may terminate this Agreement by giving thirty (30) days' written notice of such intention to the other party. In the event either party commits a material breach of this Agreement, the other shall have the right to terminate this Agreement by giving five (5) days' written notice of such intention. Shipping requirements of Prime's customers are an essential part of Prime's business, and failure to adhere to such requirements may be deemed to be a material breach of this Agreement. The DOT has charged Prime with the duty of requiring You to observe safety standards while operating the Equipment under Prime's authority. It is agreed that Prime may terminate this Agreement immediately if it has information or knowledge or belief that the safety of the public is being endangered by You or Your agents or employees in the operation of the Equipment. In the event this Agreement is terminated by either party or upon the expiration of this Agreement, You shall, within forty-eight (48) hours, return all of Prime's property to Prime at a location specifically designated by Prime. If You shall fail to return Prime's property as provided herein, You shall be responsible for all expenses incurred by Prime in securing the proper return of said property. Such expenses may be charged back against any amounts owed You by Prime.

23. NOTICES. All notices, requests, instructions, consents and other communications to be given pursuant to this Agreement shall be in writing and shall be deemed received (i) on the same day if delivered in person, by same day courier or by telegraph, telex or facsimile transmission; (ii) on the next day if delivered by overnight mail or courier; or (iii) on the date indicated on the return receipt, or if there is no such receipt, on the third calendar day (excluding Sundays) if delivered by certified or registered mail, postage prepaid, to the party for whom intended to the following addresses:

If to Prime: Manager, Contractor Relations
P.O. Box 4208
Springfield, MO 65808

If to Contractor: HALLMARK TRUCKING LLC
1125 BARBOUR AVENUE
PORT CHARLOTTE FL 33948

Each party may, by written notice given to the other in accordance with this Agreement, change the address to which notices to such party are to be delivered.

24. **RELATIONSHIP OF PARTIES**. The parties intend to create by this Agreement the relationship of Carrier and Independent Contractor and not an employer/employee relationship. You are and shall be deemed for all purposes to be an Independent Contractor, not an employee of Prime. Neither You, Your employees, agents or servants, if any, are to be considered employees of Prime at any time, under any circumstance or for any purpose.

25. **ASSIGNMENT**. You shall not assign this Agreement or any rights or obligations hereunder to anyone without the written consent of Prime.

26. **DESIGNATION OF PAYEE**. You agree that, in the event there is more than one (1) individual named as the Contractor on the face page of this Agreement, that those persons so named will designate in writing which one of them shall be entitled to receive the weekly Settlement check due under the terms of this Agreement. Any change in such designation must be in writing and must be executed by all individuals named as Contractor herein. The purpose of this paragraph is to allow Prime to make one (1) Settlement check payable to one (1) of the individuals named as Contractor without retaining any exposure whatsoever for payment to the other named Contractor.

The following named Co-Contractor is hereby designated as the individual to receive all weekly Settlement checks in this name only:

APPROVED: _____

_____

27. **MODIFICATION OF SCHEDULES**. From time to time during the term of this Agreement amounts required to purchase insurance from a Prime affiliate or through Prime, lease or purchase payments, reserve account requirements, Qualcomm user fees and other like items may be changed from those amounts set forth on the Schedules attached hereto by the person making such charges. In such event and upon receipt in writing of notice of such modification by Prime from the person making the modification,

Prime shall notify You in writing of such change. Unless You instruct Prime in writing to the contrary within ten (10) days of the date of Prime's notice to You, the appropriate Schedule shall be deemed modified to reflect the new amount being charged and the Schedule shall be deemed by the parties as being amended accordingly.

28. SET-OFF. You hereby grant to Prime the right of immediate set off against Your weekly Settlement of all amounts due from You to Prime under the terms of this Agreement.

29. **LEASE EXPENSES ADVANCES**. If You lease Your Tractor from Success Leasing, Inc. ("Success"), Your Lease contains financial obligations in addition] to Lease Charges, Excess Mileage Charge and Tire Replacement Reserve. Those additional obligations are found in paragraphs 10, 12, 14, 15, 17 and 19(d) of Your Lease. Those obligations may be advanced by Success or Prime on Your behalf. In the event they are, You hereby authorize Prime to deduct from Your Settlement or Your Performance Bond amounts equal to such advances and remit to the entity which made the advance. The amount deducted shall be the actual cost, of each such obligation.

30. GOVERNING LAW AND ARBITRATION. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF MISSOURI. ANY DISPUTES ARISING UNDER, ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING AN ALLEGATION OF BREACH THEREOF, AND ANY DISPUTES ARISING OUT OF OR RELATING TO THE RELATIONSHIP CREATED BY THE AGREEMENT, AND ANY DISPUTES AS TO

THE RIGHTS AND OBLIGATIONS OF THE PARTIES, INCLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION IN ACCORDANCE WITH MISSOURI'S ARBITRATION ACT AND/OR THE FEDERAL ARBITRATION ACT. ANY ARBITRATION BETWEEN THE PARTIES WILL BE GOVERNED BY THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION (THE "RULES"). THE PARTIES SPECIFICALLY AGREE THAT NO DISPUTE MAY BE JOINED WITH THE DISPUTE OF ANOTHER AND AGREE THAT CLASS ACTIONS UNDER THIS ARBITRATION PROVISION ARE PROHIBITED. IN THE EVENT OF CONFLICT BETWEEN THE RULES AND THE PROVISIONS OF THIS AGREEMENT, THE PROVISIONS OF THIS AGREEMENT SHALL CONTROL. EXCEPTIONS/CLARIFICATIONS OF THE RULES INCLUDE: (i) THE PROCEEDINGS SHALL BE CONDUCTED BY A SINGLE, NEUTRAL ARBITRATOR TO BE SELECTED BY THE PARTIES, OR, FAILING THAT, APPOINTED IN ACCORDANCE WITH THE RULES, (ii) THE SUBSTANTIVE LAW OF THE STATE OF MISSOURI SHALL APPLY, AND (iii) THE AWARD SHALL BE CONCLUSIVE AND BINDING. A DEMAND FOR ARBITRATION SHALL BE FILED NOT LATER THAN ONE (1) YEAR AFTER THE DISPUTE ARISES OR THE CLAIM ACCRUES, AND FAILURE TO FILE SAID DEMAND WITH THE ONE (1) YEAR PERIOD SHALL BE DEEMED A FULL WAIVER OF THE CLAIM. THE PLACE OF THE ARBITRATION HEREIN SHALL BE SPRINGFIELD, MISSOURI.

BOTH PARTIES AGREE TO BE FULLY AND FINALLY BOUND BY THE ARBITRATION AWARD, AND JUDGMENT MAY BE ENTERED ON THE AWARD IN ANY COURT HAVING JURISDICTION THEREOF. THE PARTIES AGREE THAT THE ARBITRATION FEES SHALL SPLIT BETWEEN THE PARTIES, UNLESS CONTRACTOR SHOWS THAT THE ARBITRATION FEES WILL IMPOSE A SUBSTANTIAL FINANCIAL HARDSHIP ON CONTRACTOR AS DETERMINED BY THE ARBITRATOR, IN WHICH EVENT PRIME WILL PAY THE ARBITRATION FEES.

31. **ENTIRE AGREEMENT**. This Agreement shall be comprised of this document executed below by You and Prime as well as all Schedules initialed by You (as amended from time to time as herein provided). Together they constitute the entire agreement between the parties hereto and may not be modified or amended except by written agreement executed by both parties or, in the case of the Schedules, as otherwise herein provided.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the day and year first written herein.

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

NEW PRIME, INC.

By: _____

"Prime"

_____

_____

"Contractor"

By Your initials on this page You acknowledge receipt of a copy of this Agreement from Prime

_____

_____

"Co-Contractor"

INDEPENDENT CONTRACTOR OPERATING AGREEMENT
SCHEDULE 1
Reefer Division

PAYMENT

Payments made to You by Prime under paragraph 3 of the Agreement shall be as follows:

1. **PERCENTAGE OF REVENUE**. Prime shall pay You 72% of the line haul revenue received by Prime for freight transported by You. The phrase "line haul revenue" means all amounts paid by Prime's customers for transportation of freight exclusive of accessorial charges. Accessorial charges are charges made by Prime to the customer for goods and services in addition to freight transportation, including but not limited to such things as loading and unloading, special permits, pallets, tarp fees and shag fees. Not all accessorial charges will be designated by the customer as separate from the "line haul revenue", but shall be itemized by Prime on the freight bill as a separate charge and for purposes of this paragraph shall not be included in the "line haul revenue". Examples are the following charges that shall be deducted from "line haul revenue" when determining payment to You: (i) all pallets that are not provided or paid for by the customer shall be charged up to $5.00 per pallet per load; (ii) all amounts paid by Prime to You or a third party for loading and unloading in excess of that paid by the customer; and (iii) all amounts paid by Prime to You or a third party for tarp and shag fees in excess of that paid by the customer. Prime may make surcharges to some customers for fuel (tractor

and/or refrigerated unit) or for liability and cargo insurance above the minimum required by law. When these surcharges are made, they shall be so designated on Prime's freight bill and itemized as a separate charge. For purposes of this paragraph, such charges shall not be included in the "line haul revenue". In addition, all amounts paid by Prime to you for fuel surcharges (tractor and/or refrigerated unit) in excess of that paid by customer will be deducted from linehaul. All fuel surcharges collected from customer in excess of amounts paid to you by Prime shall be added to linehaul.

2. REVENUE AVERAGING. Subject to the terms, conditions and limitations contained in the Agreement, You shall receive no less than $1.02 per authorized dispatched mile while operating the truck. Revenue paid to You shall be reconciled every 100,000 authorized dispatched miles. If revenue paid You at any time during the reconciliation period averages below $1.02 per mile while operating the truck Prime shall make advances to You sufficient to bring Your average revenue up to the stated minimum. Thereafter, if your revenue increases sufficiently so as to average in excess of the stated minimum, Prime will be entitled to recover from You that portion of such advances that caused Your revenue to average above the stated minimum, and You authorize Prime to deduct such amount from Your Settlement.

3. RECOVERY UPON TERMINATION. If You terminate this Agreement prior to the end of any single reconciliation period, and You have averaged less than $1.02 per authorized dispatched mile while operating the truck, but have received advances up to that

amount, You agree to repay Prime the difference between the actual average rate per mile and $1.02 per mile while operating the truck and agree that such amount may be deducted from Your security deposit.

4. **EQUIPMENT**. You agree to furnish Your own tools and equipment necessary for Your operations including, but not limited to, a pulp thermometer, two load locks, a trailer security lock approved by Prime, wrenches sufficient to adjust tractor and trailer brake assemblies, fire extinguisher, flashlight, and a minimum of three reflective/warning highway triangles.

NEW PRIME, INC.

By: _____

Date: _____ _____

"Prime"

_____

Date: _____ _____

"Contractor"